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# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

*New York City*

## SURROGATES' COURTS

OF THE

STATE OF NEW YORK.

BY

THEODORE F. C. DEMAREST.

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VOL. VI.

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REPORTS OF CASES  
ARGUED AND DETERMINED  
IN THE  
SURROGATES' COURTS  
OF THE  
STATE OF NEW YORK.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—September, 1887.

MATTER OF HOPKINS.

*In the matter of the estate of LOUISA S. HOPKINS,  
deceased.*

A legatee, or a distributee of the property of an intestate, whose legacy or share is less than \$500 in value, is, upon that ground, exempt from the tax imposed upon the passing of certain property, by L. 1885, ch. 483. The word, "estate," in the clause of § 1 of that act, as amended by L. 1887, ch. 713, providing "that an estate which may be valued at a less sum than five hundred dollars shall not be subject to such duty or tax," refers to the interest of the taker.

Decedent, by her will, bequeathed the residue of her estate, amounting to more than \$6,000, to the executor, in trust, to convert and invest, and pay the net income to P., her brother, for life, with discretionary power to expend from \$200 to \$300 of the principal annually, for P.'s support; remainder to distant relatives.—

*Held*, that a tax upon the remainder could not be fixed or recovered during P.'s lifetime.

*Matter of Smith*, 5 *Dem.*, 90; *Matter of McCready*, *post*, 292; approved.

## 2 CASES IN THE SURROGATES' COURTS.

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### MATTER OF HOPKINS.

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MISS HOPKINS was a spinster, leaving no father or mother her surviving, but leaving one brother. She left a will; by which she bequeathed to Annie E. Hyatt the sum of \$150, and also her wearing apparel, household furniture, silverware, the pictures of her father and mother, her diamond ring, gold watch and chain, and all her other jewelry and personal ornaments, with a few exceptions; to Abbie H. Hyatt \$150; and to Dustan Hyatt and Robert Hyatt \$100, each—all whom were distant relatives. After making some other small bequests, she gave the residue of her estate, amounting to upwards of \$6,000, to her executor, in trust to convert and invest, and to pay the net income to her brother Peter H. Hopkins, and also, in his discretion, to pay to said brother from two to three hundred dollars a year of the principal for his support, and at the death of the brother, what might remain was given to the Hyatts above named, equally.

CLARENCE H. FROST, *for executor.*

THE SURROGATE.—When the opinion in the Matter of Jones (5 *Dem.*, 30) was prepared, the question as to the construction of the proviso appended to § 1 of the act of 1885, to the effect that “an estate which may be valued at a less sum than five hundred dollars shall not be subject” to the duty or tax provided by the act, had not been presented for consideration; but it was then held that the estates to be appraised under the provisions of the 13th section, were not the estates of deceased persons, but of those to whom they were given, or by whom they were inherited.

## MATTER OF HOPKINS.

It would seem in harmony with this view to determine that the *estates* mentioned in the proviso are the same. I concur, therefore, with Surrogates Lott (Matter of Smith, 5 *Dem.*, 90), and Rollins (Matter of McCready, *post*, 292), in holding that any estate devised, inherited, or bequeathed, or the subject of distribution to any person, which shall be valued at less than five hundred dollars, is not subject to the tax provided by said act. The language in which the act is couched, does not render the meaning very perspicuous. Ordinarily, the word "estate" would not be employed to designate the interest of a legatee in a gold watch, a diamond necklace, a horse, or household furniture bequeathed to him; and yet the property so given would, strictly, become his personal estate. The word is more frequently used in connection with an interest in land; still it is applicable to an interest in any kind of property, personal and real.

An appraiser was appointed to fix the value of the "estates" bequeathed by the will in question. The articles of wearing apparel, household furniture, silverware, pictures, etc., etc., bequeathed to Annie E. Hyatt, other than the \$150 in money, were appraised, and the value fixed at \$257.65. Add the legacy in money, and the whole amount is \$407.65. Hence the legacy is not subject to the tax. The other legacies stand in the same position in this respect.

The value of the estate, or the amount of it, which may remain after the death of the brother, Peter H. Hopkins, it is impossible to ascertain, with a view to fixing the tax it should yield. It is also impossible to determine how long he may live, and how much of

#### 4 CASES IN THE SURROGATES' COURTS.

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HAVILAND V. COCKS.

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the principal fund may be paid him by the executor, in the exercise of the limited discretion conferred upon him by the will. Indeed, it is possible that the whole *residuum* may be exhausted in the use of the discretionary power. In case of his death, the amount remaining (if any) will be known. When that shall have occurred, whether the tax can then be fixed and recovered under the provisions of the act, it is needless to inquire. It cannot be done now. As the matter stands, all the legacies are free from the tax.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—October, 1887.

HAVILAND v. COCKS.

*In the matter of the judicial settlement of the account  
of PHEBE C. HAVILAND, and others, as executors  
of the will of JOHN COCKS, deceased.*

In order to render a bequeathed annuity a demonstrative legacy, and so not liable to abatement in case of a deficiency of assets, the will must specify certain property owned by the testator in kind, the income arising wherefrom is to produce the amount of the annual provision.

Testator, who left an estate of the value of about \$125,000, by his will directed the executors "to invest such sum of my (his) property as will net one thousand dollars . . . . per year . . . . and from such sum so invested to pay" to his widow, A., "the sum of one thousand dollars per year," from his decease, during widowhood, in lieu of dower; made provision for other beneficiaries; and disposed of the remainder.

Upon a judicial settlement of their accounts, it appeared (1) that one of the executors had, in hand, all that remained of the estate, viz.:



## HAVILAND V. COCKS.

\$7,000, of which about \$4,000 represented principal rescued from the wreck of an unauthorized investment, and the balance accumulated interest; and (2) that A.'s claim for arrears of annuity was sufficient to exhaust the entire fund.—

*Held*, that the annuity was a general legacy; and that, of the fund in question, A. was entitled only to the accumulated interest in the executor's hands, and such interest as might thereafter accrue upon the remaining *corpus*.

THE testator, John Cocks, died in 1868, leaving an estate of the value of about \$125,000, of which \$45,000 consisted of mortgages mostly on lands in Westchester county. He left him surviving his widow, Adelia Cocks, and five children, namely, Mary, ~~Phoebe~~, ~~Anna~~, ~~David~~ and ~~Harrison~~, Mary being then the wife of George J. Barlow, and ~~Phoebe~~ the wife of ~~Daniel E. Haviland~~. These were all made executors of his will. Anna afterwards became the wife of — Varney. The first clause of the will is as follows: "First. I direct my executors hereinafter named, and the survivors of them, to invest such sum of my property as will net one thousand dollars, over and above all taxes and assessments, per year, upon bond and mortgage upon real estate in the county of Westchester, within three months after my decease, and, from such sum so invested, to pay to my beloved wife, Adelia Cocks, the sum of one thousand dollars, per year, from my decease, and to be paid to her by my said executors semi-annually, so long as she shall remain my widow, unmarried, and no longer, and this provision to my said wife is in lieu of dower."

By the second clause, he gave to his daughter, Anna, the sum of three thousand dollars, and by the third clause, he gave all the rest and residue of his

## HAVILAND V. COCKS.

estate, "including the above invested sum," when the widow should cease to be interested in it, to the above named five children, share and share alike, and provided that David's share should be invested on bond and mortgage, the income whereof was directed to be applied to the support of himself, wife and children, during his life, and, at his death, his share to be equally divided among his children. The executors, Daniel E. Haviland, and Phebe his wife, and Mrs. Varney had been released by the widow, and they had no personal interest in the present controversy. George J. Barlow, and wife, and Harrison Cocks became the chief acting executors. Barlow died insolvent, and Harrison Cocks was living in the same condition. David Cocks never had anything to do with the management of the estate. He was, by proper proceedings, declared to be a lunatic, or person incompetent to manage his affairs, and George J. Barlow was appointed his committee, and David's share was paid to him. Mrs. Haviland, as executrix, had in her hands about \$7,000 of the money of the estate, of which about \$4,350 was principal,—and all that remained of the *corpus* of the estate, the residue being accumulations of interest upon it.

On this judicial settlement of the account, the chief question was in regard to the disposition of the principal fund then in the hands of Mrs. Haviland; and chiefly whether it could be used toward the extinguishment of the arrears of annuity, which exceeded that sum. For further facts reference is made to the case of *Cocks v. Barlow* (5 *Redf.*, 406).

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HAVILAND V. COCKS.

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M. L. COBB, *for executors, Haviland and Varney.*

JAMES A. HUDSON, *for Adelia Cocks, widow.*

F. LARKIN, *for executors, Mrs. Barlow and H. Cocks.*

WM. M. SKINNER, JR., *special guardian.*

THE SURROGATE.—I have before had occasion to advert to the mismanagement of this large estate (5 *Redf.*, 406). All that remains of an estate valued at \$125,000, which can be called in question here, so far as the widow is concerned, is the sum of about \$7,000. After investing in some western State \$10,000, at an interest of ten per cent., to produce the annuity of \$1,000 for the widow, the executors, having paid the \$3,000 legacy to Anna, proceeded to divide what was in a condition for a division, among themselves as residuary legatees, except the share of David, which went into the hands of George J. Barlow as the committee of his person and estate. Whether it so passed into his hands by order of the Supreme Court, or simply because he already had it and kept it, does not appear. Barlow about a year since died, as it is understood a bankrupt, and the pecuniary circumstances of Mrs. Barlow and Harrison Cocks are said to be no better. Mr. and Mrs. Haviland and Mrs. Varney have been settled with by the widow, and are no longer liable individually, or as executors. A decree can be taken against the former for the arrears of the annuity, if it shall be deemed expedient. There is reasonable ground to apprehend that it would be fruitless in results. All that remains as *corpus* of the estate is \$4,350, rescued chiefly from

the wreck of the western investment, together with nearly \$3,000 of accrued interest. As it is now understood, the amount of annuity due to the widow is equal to the accrued interest and the sum so constituting the present *corpus* of the estate; and the question is whether this court can direct the payment of the whole to her.

The legacy is not specific, nor is it what is called demonstrative. To give it the latter character, a testator should specify certain property which he has, in kind, the income of which shall produce the amount of the legacy, as if it were made payable out of the interest of a bond and mortgage he then had, or out of dividends on certain stocks he then owned, and the like (see *Walton v. Walton*, 7 *Johns. Ch.*, 268). If, in this case, the testator had, by his will, set apart bonds and mortgages he then had, to the necessary amount, and directed the executors to pay the legacy or annuity of \$1,000, out of the interest that accrued thereon, then it would have been a demonstrative legacy. But it will be seen that he did not do that. He simply directed his executors to invest sufficient of his estate on bond and mortgage, to produce interest enough, yearly, to pay the annuity. It follows that the legacy is general. The only peculiarity about it is, that the mode of raising it is indicated. Hence, being general, it is subject to abatement. If, for instance, the executors had invested \$18,000 in the manner directed by the will, and, in the course of time, from depreciation in values and other unforeseen causes, one half the amount so invested was lost, the annuitant would receive only a moiety of the legacy,

the other legatees under the will having been paid in full, without any liability, on their part, to refund. She could not compel the executors to make up the deficiency out of what remained of the principal. The testator undoubtedly supposed that he was making a provision which would result in the payment of the annuity to the wife during widowhood, but his anticipation has failed. In *Baker v. Baker* (6 *H. of L. Cas.*, 616), the LORD CHANCELLOR argued, against a construction which would take from the fund itself, to make up a deficiency of annual avails, that such a course might, in time, utterly annihilate the *corpus*, and the beneficiary be left without any provision at all; and that, therefore, nobody could suppose that such an intention could ever have existed in the mind of the testator. Here, that destruction of the *corpus* would at once be effected, if the contention on the part of the widow were to be sanctioned.

In the case of *Dickin v. Edwards* (4 *Hare*, 273), it is said by the VICE CHANCELLOR, that there is no doubt that, where a testator bequeaths a sum of money in such a manner as to show a separate and independent intention that the money shall be paid to the legatee at all events, that intention will not be held to be controlled, merely by a direction in the will that the money is to be raised in a particular way, or out of a particular fund, and he cites authorities to sustain that proposition. There, the legacy of \$1,000 was directed to be raised out of the sale of timber, and it was held that the personal estate could not be resorted to. Here I can discover no evidence of a *separate* and *independent* intention that the annuity is

to be paid *at all events*. The other legacies were to be paid at the end of a year from testator's death, which it must be assumed he knew, and were in fact then paid, thus leaving no part of the estate to which resort could be had to make good the deficiency, except the fund to be invested for the designated purpose; and this, as has been shown, cannot be done.

The conclusion is, that the widow is entitled only to the accumulated interest of the fund remaining, and such as may accrue thereon in the future.

It is claimed by the special guardian of the minor children of David Cocks, that the executors are liable for the share of which David had the use, because they permitted it to pass into the hands of George J. Barlow, where it was lost. He was appointed the committee of David's person and estate by the Supreme court. If that court directed the fund to be paid to him, it is difficult to see how the other executors can be held liable for the *devastavit*. In any event, this court is not possessed of facts sufficient to enable it to pass upon the question. If desired, the case will be held open for the reception of such evidence as may be offered on the subject.

It appears that a credit of \$500 was claimed and allowed in the account filed on the former accounting, by the executor, George J. Barlow, as paid for services of counsel to the estate. No voucher in support thereof was filed, and no objection was made to such item. It is now alleged, by the counsel representing Mrs. Barlow and Harrison Cocks in this proceeding, that such amount was not in fact paid, and is still due and ought to be paid out of the estate. The answer

is, that it has been, in effect, so paid already, by allowing the executors credit therefor. That counsel is not a party to this proceeding, and an individual claim of his cannot, properly, be here considered. While he ought to be compensated for his services, his remedy is against those for whom they were rendered.

It is also claimed that an allowance was made in the former decree, of \$200 to Cocks and the Barlows, for services of counsel in that proceeding, and that it should be decreed to be paid out of the fund now in hand. The plain meaning of that decree was that they should retain it out of moneys of the estate with which they were chargeable, and not that it should be paid to them out of the remnant remaining in the hands of the other executors. Without entering into other considerations adverse to the claim, it must be held that, if there be any remedy, it is under that decree, and that no new adjudication can now be made, at this late day.

In case the proceedings terminate at this stage, a moderate allowance for costs will be made to the executrix, Mrs. Haviland, to the widow, and to the special guardian, to be paid out of the principal fund.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—November, 1887.

HOPKINS v. LANE.

*In the matter of the application for a decree revoking the decree admitting to probate the will of LOUISA S. HOPKINS, deceased.*

A petition seeking to procure the revocation of probate of a will under Code Civ. Pro., § 2847, and, *pari passu*, the vacating of the decree granting probate upon a ground specified in *id.*, § 2481, subd. 6, is objectionable on the ground of multifariousness.

The provision of 2 R. S., 65, § 50, making a legacy, etc., to a subscribing witness to a will, void where the legatee's testimony is essential for procuring its admission to probate, cannot be waived by the petitioner for probate alone, where others are interested in the residuary estate.

A Surrogate is competent to entertain an application for probate of a will, although related by affinity within the sixth degree (Code Civ. Pro., § 46), to one designated a legatee therein,—the latter not being a party to the special proceeding. ....

The will of testator bequeathed "to the rector, church-wardens and vestrymen of S. P. Church," a religious corporation, five hundred dollars for a stained glass window, or a lectern and pulpit, "whichever the said rector," etc., "shall deem most suitable."—

*Held*, that the Surrogate was not disqualified, by the fact that he was senior warden of the church in question, from sitting in the special proceeding instituted to procure probate of the will,—either under Code Civ. Pro., § 2496, subd. 1, as being "a devisee or legatee of any part of the estate, or under *id.*, subd. 3, which disqualifies him only "where he is named as executor, trustee or guardian in any will or deed of appointment involved in the same matter."

THE will in question was admitted to probate December 16th, 1886, and it is now sought to have the decree, admitting the same to probate, vacated.

Among other provisions, the testatrix bequeathed a legacy as follows: "*Fifth*. I give and bequeath to the



rector, church-wardens and vestrymen of St. Peter's church, in the village of Peekskill, the sum of five hundred dollars, for a stained glass window, or a lectern and pulpit (whichever the said rector, church-wardens and vestrymen shall deem more suitable) to be placed in St. Peter's church, Peekskill, with the following inscription, 'In memory of Ezra, Susan, Harriet and Louisa S. Hopkins.'"

The *eighth* provision of the will is as follows: "I give one pair of candlesticks to Mrs. Calvin Frost and one pair to Mrs. Owen T. Coffin." The latter was one of two subscribing witnesses to the will, and is the wife of the Surrogate, who is the senior church-warden of the said St. Peter's church. The only next of kin of the decedent is Peter H. Hopkins, an attorney at law. He appeared in person at the time the will was proved, and signed and caused to be filed a writing duly acknowledged, of which the following is a copy:

"Surrogate's Court, Westchester County.—In the matter of proving the last will and testament of Louisa S. Hopkins, deceased. I, the undersigned heir and next of kin of Louisa S. Hopkins, deceased, do hereby waive the issue and service of a citation in the matter of proving the last will and testament of the said Louisa S. Hopkins, deceased, and do hereby consent that the witnesses to the same be immediately examined with a view to the probate thereof.

PETER H. HOPKINS."

Whereupon the subscribing witnesses to the will were sworn and examined, and a decree was entered admitting the will to probate. The sole executor

named in the will, Henry H. Lane, qualified and entered upon the discharge of his duties.

On the hearing, in this matter, the petitioner filed a consent that Mrs. Coffin be examined, on the re-proving of the will, as a subscribing witness, "without forfeiture or relinquishment" of the gift or bequest to her, the value of which has been appraised at \$2.50.

He, however, objected that the Surrogate was disqualified from acting in the matter of the original probate, first, because his wife was a legatee, and second, because he was senior warden of St. Peter's church.

PETER H. HOPKINS, *in person*, for the motion.

C. H. FROST, *for the executor*, opposed.

THE SURROGATE.—The petition in this matter, as to the relief sought, is dual in its character. It seeks first an order vacating the decree admitting the will to probate, as provided by subd. 6 of § 2481 of the Code, and, second, the revocation of the probate, as authorized by title 3, Article 2, chap. 18 thereof. On the application to vacate the decree, only the parties in the original probate proceeding need be cited, but, in the proceeding to revoke, not only those parties, but all the legatees, etc., are required by statute to be cited. The first proceeding involves a mere motion, the latter, a trial upon the merits. The petition is, therefore, objectionable as multifarious. I will, however, proceed to consider the motion to vacate, which is, thus far, the only matter submitted. This I have

power to determine (*Seaman v. Whitehead*, 78 *N. Y.*, 306).

The petitioner alleges in his application that, at the time the will was proved and the decree entered admitting the same to probate, the Surrogate was disqualified from acting, and had no jurisdiction in the premises, because, first, he was, at the time, an officer of the corporation of St. Peter's church, to whom a legacy was bequeathed for a certain purpose, and, second, because his wife was and is a legatee under the will of the deceased, and prays that such decree be set aside as irregular and void for want of jurisdiction. Briefs have been submitted by both counsel, on this point only, and I am required to decide the question.

The sections of the Code bearing upon the subject are as follows: "§ 46. A judge shall not sit as such in, or take part in the decision of, a cause or matter to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree." . . . . . "§ 2496. In addition to his general disqualifications as a judicial officer, a Surrogate is disqualified from acting upon an application for probate, or for letters testamentary, or letters of administration, in each of the following cases:

"1. Where he is, or claims to be, an heir or one of the next of kin to the decedent, or a devisee or legatee of any part of the estate.

"2. Where he is a subscribing witness, or is neces-

sarily examined or to be examined as a witness, to any written or nuncupative will.

"3. Where he is named as executor, trustee, or guardian, in any will, or deed of appointment involved in the matter.

"§ 2497. An objection to the power of a Surrogate to act, based upon a disqualification, established by special provision of law, other than one of those enumerated in the last section, is waived by an adult party to a special proceeding before him, unless it is taken at or before the joinder of issue by that party; or, where an issue in writing is not formed, at or before the submission of the matter or question to the Surrogate."

If, therefore, the Surrogate was disqualified from acting, by reason of any provisions of law other than those contained in § 2496, it was incumbent upon the petitioner, if he wished to avail himself thereof, to have interposed the appropriate objections before the matter was submitted on the depositions of the witnesses. So far from doing this, he filed a consent in writing that the subscribing witnesses should be immediately examined with a view to the probate of the will. He raised no objection of any description. So far as the question of affinity is concerned, if not waived, it could not have been sustained, for the reason that the wife of the Surrogate was not a party to that proceeding. The only parties were the propo-  
nent, named as executor, and this petitioner.

And besides this, 2 R. S., 65, § 50, renders the legacy void by reason of her having been one of two subscribing witnesses to the will, without whose testi-

mony it could not have been proven. She was a resident of the State, competent to testify, as those proceedings show, and was neither an heir at law nor next of kin of decedent, nor otherwise entitled to any share of her estate, had she died intestate. Thus, that witness, being by law deprived of the legacy, ceased to have any interest in the matter, and it stood in the same position as if she had not been named as a legatee. But the petitioner, probably seeing the difficulty, sought to obviate it by filing, in this matter, a stipulation that she be examined on re-proving the will without forfeiting her legacy. This it is not competent for him, alone, to do. If the legacy to her fail, as it does under the statute, and the will be undisturbed, it will fall into the residuum, in which several persons besides the petitioner, are interested. It is sufficient, however, to say that the decree cannot be revoked on that ground, as the objection, if it had been raised, was without force.

The only remaining question is, was the Surrogate disqualified by reason of the provisions of subd. 1 and 3 of § 2496. Undoubtedly, persons and classes of persons, and corporations may be legatees. Is the Surrogate, or does he claim to be, a legatee of any part of the estate? He certainly makes no claim to that effect, nor is any legacy bequeathed to him by the will. A legacy is given to a religious corporation, of which he is an officer, for certain purposes. He is not named or described as legatee, but the corporation is. It is not given to both. If any special provision of law anywhere forbids his sitting in such a case, on the ground that he is interested as an officer of the

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MORGAN V. VALENTINE.

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corporation, the petitioner waived it by failing to raise the objection. But the Surrogate has nothing to gain or lose by this provision for the church, which has now its complement of windows, and its lectern and pulpit. Sentiment might be gratified by the bequest, but no pecuniary interest is affected. Nor is he "named" as executor, trustee, etc., in any manner. It is true, the corporate body may act as trustee in applying the amount of the legacy in the manner indicated, but the Surrogate is not "named" or called by name, in the will as executor or trustee. The statute objects to his acting only where his name is inserted as such executor, etc. If any other valid objection under any special provision, might have been raised, it has also been waived.

The facts alleged are insufficient to warrant the making of the certificate as provided by § 2487 of the Code.

For the reason assigned, the motion is denied.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—November, 1887.

## MORGAN v. VALENTINE.

*In the matter of the judicial settlement of the account  
of CHARLES V. MORGAN, as executor of the will  
of JAMES MORGAN, deceased.*

The rule allowing interest, from the date of a testator's death, on a bequest to a legatee, towards whom the former stood *in loco parentis*, is con-

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ditioned upon the circumstances that the beneficiary be one for whom no other provision is made, and who, without such allowance, would be destitute of income during the period expiring at the end of a year from the grant of letters. It is not enough that an income, actually enjoyed, is insufficient for his support in a style which he may desire.

A tender, by an executor, to a legatee, of the amount of the legacy and interest lawfully due, if refused, bars a claim for interest from the time of the tender, as effectually in a Surrogate's court, as in a case of an attempted enforcement of the legatee's demand by a civil action against the executor.

THE deceased, by his will, among other things, bequeathed to his daughter, Eugenia Valentine, a legacy of \$20,000. By a codicil, this sum was reduced to \$10,000. She contested the codicil, which finally was admitted to probate. On appeal to the general term of the Supreme Court, the decision of the Surrogate was affirmed. After which, and more than a year subsequent to the issuing of letters testamentary, the executor tendered to her the \$10,000, and interest thereon after a lapse of a year from the date of the letters, which she refused to accept, and subsequently appealed to the Court of Appeals, which last appeal, it was understood, had been abandoned. On this accounting, she claimed interest on the legacy from the date of issuance of the letters testamentary, and submitted an affidavit tending to show that she was dependent upon the legacy, or the interest thereof for support; while the executor submitted an affidavit showing that she had property of her own, independent of that devised and bequeathed to her; that he had paid to her \$200 on a note he had given her for money lent before testator's death; that she had sold some of the real estate devised to her for \$4,000, and

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was erecting a new building or buildings in New Rochelle, where she resided.

By the will no time for payment of the legacy was fixed.

Other facts appear in the opinion.

BANKS & ANDERSON, *for executor.*

M. J. KEOGH, *for legatee.*

THE SURROGATE.—Ordinarily a legacy, where no time of payment is fixed by the will, is not payable until one year after the granting of letters. There are some exceptions, however, to this rule. The one bearing upon the question here presented is, where a legacy is left by a parent to a child by way of support, for whose maintenance no other provision is made and who, unless interest be allowed, is without income intermediate the death of the testator and the end of a year from the granting of the letters (2 Redf. on Wills, 467, and *n.*). The facts in this case do not seem to bring Mrs. Valentine's claim of interest within this exception. The testator devised to her real estate of the estimated value of about \$16,000. At the time of his death, the affidavit presented by the executor shows that she was the owner of some real estate in Brooklyn, and that he had borrowed from her two hundred dollars, for which she held his promissory note. So that, taking into consideration these facts in connection with the facts of the devises made to her by the will, it would be incorrect to hold that no other provision was made for her other than the legacy, or that she was without income during the year.



According to her ideas, such income may have been insufficient for her support in a style she desired.

Beside, she had an able-bodied husband whose duty, whatever his inclination may have been, was to provide her a suitable support. Nor was this all. She had two sons, men grown, and in some kind of business, upon whom rested, in connection with their father, a natural, if not a legal, obligation to provide for her wants. Her case, it will be thus seen, is very different from that of a child destitute of all other means of support other than the legacy. There is nothing contained in the will, nor in the surrounding circumstances to indicate that this legacy was given for the purpose of maintenance. Her claim is deemed untenable, without allusion to the further fact that she has sold a portion of the real property devised to her for \$4,000.

The tender of the amount of the legacy and interest, to the legatee, which she refused to accept, must be given its legal effect. If the tender were of sufficient amount, it will bar any claim for interest from that time, as effectually here, as if she had sued to recover her legacy in a court of law.

The decree will be prepared in accordance with the above views.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—November, 1887.

JENNINGS v. BARRY.

*In the matter of the judicial settlement of the account  
of JOSEPH G. JENNINGS, as administrator, with  
the will of SAMUEL S. BARRY, deceased, annexed.*

Testator, by his will, directed the executors to invest the residue in a manner specified, and pay the net increase and income arising therefrom to his widow, for her support, during life; and further provided that, on the death of the widow, the residue be divided into five equal shares, one of which he gave to a grandson, H., and, in case he died before the widow, leaving issue, to the latter.

H. was indebted to testator upon a promissory note, drawing interest, which the executors reduced to judgment; and died, after testator and before the widow, leaving issue, and the judgment unsatisfied. The judgment having been decreed to be a set-off to the claim of the issue, of their share of the residue after the death of the widow, it was further,—

*Held*, that the interest accrued upon the judgment should be apportioned; so much thereof as had accrued at the date of the widow's death to go to her representatives, and the balance to the issue of the judgment-debtor.

WILLIAM R. HULL was one of the residuary legatees of the deceased, whose legacy was to come into his possession at the death of the widow, who had a life interest in the estate. If he died before the widow, leaving issue, such issue were to take his share. He did so die, leaving issue. He was indebted to the testator at the time of the latter's death, in the sum of about \$2,000. The executors of the will had obtained a judgment against him for the amount of his debt,

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JENNINGS V. BARRY.

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which was still unsatisfied. It having been held that the legacy vested in Hull at the time of the testator's death, and that, therefore, the amount of the judgment was a proper counterclaim against that share, on the settlement of the decree a question arose as to whether the whole of the accrued interest belonged to the *corpus* of the estate, or whether it should be apportioned between the estate and the legal representatives of the deceased widow.

S. H. THAYER, JR., *for administrator.*

Hess & Townsend, *for children of Robert A. Barry, deceased.*

J. A. BUSH, *for Mrs. Jennings and others.*

E. MORE, JR., and W. P. PLATT, *for general guardian of Hull infants.*

C. L. ANDRUS, *for children of Priscilla Bowne, deceased.*

W. M. SKINNER, JR., *special guardian for Henry J. McCarter, infant grandson of Robert A. Barry, deceased.*

**THE SURROGATE.**—By the will the executors were directed to invest on bond and mortgage the residue, being the greater part of the estate, and to pay to the widow the net increase and income arising therefrom, semiannually, during her natural life, for her use and support, and at her death it was directed to be divided into five shares, one of which testator gave to his grandson, Hull, and in case of his death before that of the widow, to his issue. It was held by this court in the same matter (5 *Dem.*, 531), that the legacy vested in Hull at the death of the testator, and that the judgment the executors had obtained against him was a

legitimate subject of set-off against the share so bequeathed to him, and now belonging to his issue. There is interest which has accrued upon the judgment, and the question is whether it belongs wholly to Mr. Barry's estate, or should be apportioned between the personal representatives of Mrs. Barry and of the testator.

It is contended that, as Hull was insolvent and paid no interest upon the sum in question, there was no income derived from it, and that, therefore, it being realized since her death, it must be considered as a part of testator's residuary estate, and be distributed as a part of the five shares mentioned in the will. This position does not seem to be tenable. The widow was given the whole of the income of the estate, and this indebtedness was a part of that estate. It is true, the interest was not collected in her lifetime, but it was then accruing. It is very much as if the executors had made an investment of \$2,000, on bond and mortgage pursuant to the directions of the will, two years and three months before the death of the widow, on which they were paid no interest before that event, but collected it afterwards. In such a case, there would be an apportionment. Her personal representatives would be entitled to the interest that had accrued at the time of her death, and the residue would belong to the administrator with the will annexed (1 Story's Comm. on Eq., 488, § 480; 2 Redf. on Wills, 475).

In *Wilson v. Harman* (2 Vesey Sen., 672), the court said that interest is supposed to grow due from day to day, and that the person entitled to it, is entitled to

the last hour of the day. In *Hay v. Palmer* (2 *P. Wms.*, 501), where a yearly sum, payable half-yearly, was to be raised out of rents and profits, by sale, mortgage or lease, etc., for support of a daughter until she became eighteen years of age, and she became of that age before the expiration of the half-year, it was held that she was entitled to the income up to the arrival at that age. Here, the net increase and income was given to the widow, for her use and support during life. This is equivalent to giving her the net interest, for the purpose indicated. It is supposed to have grown due from day to day, upon the judgment, and, although not paid, she was entitled to it by the terms of the will. Had the judgment been against some stranger to the estate, and the amount, with interest, been collected since her death, there can be no doubt but that the accrued interest up to that time would have belonged to her representative. The fact that it was against a legatee can, of course, make no difference. Nor can it make any difference that the interest in question has accrued upon a judgment. The executors were directed to convert and invest on bond and mortgage. The original indebtedness was a promissory note, drawing interest. They endeavored to convert it into money, that they might obey the direction to invest. By obtaining the judgment they merely changed the form of indebtedness. It still remained a part of testator's estate, to the "increase" of which the widow was entitled.

Decree accordingly.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—December, 1887.

## ROSE v. ROSE.

*In the matter of the judicial settlement of the account  
of PETER ROSE, as executor of the will of JOSEPH  
ROSE, deceased.*

The provisions of Code Civ. Pro., § 2734, excluding the testimony of an executor in support of a claim for credit for disbursements, the vouchers in respect whereof have been lost, may be waived by those for whose protection the rule was established. Such a waiver is effected where the parties objecting to the account call the executor as a witness, and examine him as to the alleged payments.

The same rule applies to a case of imperfect vouchers, explained by the testimony of the executor elicited by the objectors.

The will of testator directed the executor to sell his real property, at such times and in such lots as would be to the best advantage; invest the proceeds and apply the interest to the support of his widow and children during the minority of the latter; and ultimately to divide the principal. The executor erected, with funds of the estate, a dwelling-house, upon a parcel of the land, which was afterwards sold, with the improvements, at a loss of \$650. The evidence did not clearly disclose by whom the sale and conveyance were made.—

*Held*, that, if the sale was made by the executor, he was liable for the deficit, having exceeded the authority conferred by the will; but that, if the beneficiaries sold the property, they conveyed a good title, and must be deemed to have taken the land and dwelling in lieu of the proceeds of sale,—thereby ratifying the executor's act in erecting the latter.

ABOUT twenty years ago, the testator, Joseph Rose, died at Stony Point, Rockland county, leaving, him surviving, his widow, Charlotte Rose, and two infant children, Wallace and Emma. The will was duly admitted to probate by the Surrogate of that county,

the material substance of the instrument being stated in the opinion. In 1882, this proceeding for an accounting by the executor was commenced, but the county judge of that county, who acted as Surrogate, and the District Attorney, being both disqualified to act therein, the matter was, under § 2485 of the Code, sent to the Surrogate of Westchester county.

Before the commencement of the proceeding, the widow had intermarried with a man by the name of Babcock, and pending it, the son, Wallace Rose, died intestate, leaving no widow or children. His administrators, Charlotte Babcock and John W. Furman, afterwards became parties to this proceeding. The executor, pursuant to the direction of the will, sold a parcel of real estate, left by the testator, for \$3,500, of which \$2,000 was paid in cash, and a mortgage was given for the \$1,500, balance. The widow refused to sign the conveyance to the purchaser, and instituted proceedings to recover her dower. In consequence, the purchaser refused to pay interest on the mortgage. The latter was ultimately foreclosed, and the premises brought at the sale \$1,800, the estate realizing, after deduction of the costs and expenses, about \$1,500. On the hearing in this matter, some of the vouchers for alleged payments made by the executor were lost, and others were imperfect. The contestants put the executor upon the stand as a witness, and he was fully examined as to such payments.

Other facts sufficiently appear in the opinion.

**CHARLES C. SUFFERN, and ALONZO WHEELER, for executor.**

**H. B. BATCHELDER, for contestants.**

**W. M. BARTON, special guardian.**

THE SURROGATE.—It is provided by § 2734 of the Code, that an executor may be allowed items of credit for payments exceeding \$20, if he proves, by his own oath or otherwise, that he took no vouchers; or that the vouchers have been lost or destroyed, by proving the payments by the persons to whom they were made, or if they be dead or cannot be found, by any competent evidence, other than his own oath or that of his wife. The rigid rule of the Revised Statutes (2 R. S., 92, §§ 54, 55) is thus relaxed. Under the present law, in a case of an accounting where no opposition was interposed, it would be incumbent on the Surrogate, in case of lost vouchers, to exclude the testimony of the executor as to the alleged payments. The rule is stringent, that beneficiaries may be protected from possible dishonesty of those acting in fiduciary capacities. So, his oath would be excluded, in case of a contest, on objection made, to sustain the letter as well as the policy of the statute. But, where the contesting party himself calls and examines the executor as to such payments, a different question arises. Is he not bound by his own act? It is very well settled that a party may waive a statutory, and even a constitutional, provision made for his benefit, and after doing so, he cannot afterward ask for its protection (*Lee v. Tillotson*, 24 *Wend.*, 337; *Embury v. Conner*, 3 *N. Y.*, 511; *Matter of Cooper*, 93 *N. Y.*, 507).

Hence, the evidence of the executor, concerning payments made by him where he took vouchers, which are lost, is binding upon the contestants. This rule will also apply to the case of imperfect vouchers, which



are rendered perfect by the oral testimony of the executor elicited by the contestants. \* \* \*

On the foreclosure sale of the Mackey mortgage, the executor is undoubtedly correct in charging himself with the amount received by him, after deducting the cost of foreclosure. If he were to be charged with the \$1,800, for which the property was sold, he would be entitled to credit for the amount of the costs and expenses of the sale.

So far as the items of the account are concerned, they are allowed with the above exceptions. Under the circumstances, the executor does not appear to be fairly liable for any more interest than he has charged himself with.

But there is another, and a serious, matter to the parties concerned, if allegations made by counsel, are correct. The testator by his will, directed a sale of all his real estate, at such time and in such lots as would be to the best advantage, and that the executor invest the proceeds to the best advantage, and that the interest arising therefrom, with as much of the principal as should be needed, should be applied by him to the support of his wife and children, until the latter should become of age, and then divide what should remain, if his wife continued unmarried, equally between her and their two children, and if she married, it was to be divided equally between the children. In 1869, the executor sold to Mary Mackey, wife of David Mackey one parcel of real estate for \$3,500, of which \$2,000 was paid in cash, and a mortgage was given for the balance. The executor erected a small dwelling-house on another parcel of land of some five

or six acres, of which the testator died seized, at a cost of about \$1,400, which he paid out of the said sum of \$2,000, part of the proceeds of sale of the parcel sold to Mrs. Mackey. The widow and children lived in the new house for a year or two, when they left it, and it was rented to parties from whom little rent was realized.

Ultimately, these few acres, it is alleged, were sold, presumably by the executor, on which he had erected the house, for \$800,—thus causing a loss to the estate of \$600, besides the value of the land. Of that value there is no evidence. Taking into consideration the facts that only one acre of it was cleared land, the rest being wooded, producing but scanty crops of any kind, scarcely yielding enough to pay for the labor, and situated in the town of Stony Point, among the foot-hills of the Dunderberg, it could have had but a small market value without the new dwelling-house. Still it must have had some value—say \$50. This would make the whole loss to the estate \$650. As the erection of the house was not authorized by the will, the executor is liable for this loss, if the allegations in regard to the sale be true. If they are not, then it would seem that the land still belongs to the estate as legal assets, as the will directed the executor to sell it, and thereby operated an equitable conversion.

If, however, it were sold and conveyed by the widow and children, or child, after the latter became of age, it indicated clearly that they elected to reconvert it into land. As no one interested in the estate could be affected by such election, other than themselves,

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MATTER OF RUSER.

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they had an undoubted right to make it (2 Jarm. on Wills, 5th Am. ed., 188; Prentice v. Janssen, 79 N. Y., 478). And their deed would convey a good title. But in thus electing to take the land with the house upon it instead of the proceeds of its sale, and selling it themselves, they sanctioned and ratified the act of the executor in erecting the house, and cannot, therefore, seek to hold him liable for any loss consequent upon a violation of duty in that regard.

The facts, relating to the sale of the last parcel of land, are not disclosed with sufficient distinctness to warrant any decision other than alternative. The principles above enumerated may be applied, in either case, to the actually existing facts, and which must be well known to the parties.

The executor appears to have acted in good faith throughout, and no valid reason is discovered to warrant the withholding of his commissions. Both parties are entitled to costs out of the fund, if any remain after the deduction of the commissions.

Decree accordingly.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—January, 1888.

## MATTER OF RUSER.

*In the matter of the application for probate of the will  
of CHARLES RUSER, deceased.*

A lost will cannot be admitted to probate upon a stipulation of counsel agreeing as to its contents, though due execution be established.

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MATTER OF RUSER.

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Under Code Civ. Pro., §§ 1865, 2621,—requiring the provisions of a lost or destroyed will to be “clearly and distinctly proved by at least two credible witnesses,”—each of the witnesses must be able to testify to all of the disposing parts of the will; it does not suffice to prove some provisions by two or more witnesses and the remainder by others.

The evidence of a witness who is shown not to have read the entire will, or otherwise to know all its contents, is valueless.

THIS was an application made by Wilhelmina Abel, widow of Charles Ruser, deceased, who had since remarried, to prove the will of the deceased, which was lost. The alleged testator died about 1876. The subscribing witnesses testified to its due execution, and the evidence showed that it was in existence at the time of his death, and was since lost.

P. L. McClellan, Esq., drew the will, which was a short one, but he could not remember the contents, further than that the whole estate was given to the wife absolutely, or for life with remainder to his children; he could not say which, but thought it was absolutely. Louis A. Rich testified that he saw the will, but did not read the whole of it. These questions were put to him, and the following were his answers thereto: “Q. State, as well as you can, the substance of this will? A. I don’t recollect. Q. You can state some parts of it which you saw? A. I think it said he left the property to his wife, or something to that effect. Q. You don’t know the full contents of the will? A. No, sir.” Jacob Kaiser, a brother-in-law of the deceased, testified that he saw the will after Ruser’s death. He did not read the whole of it, but only so far as to see that the estate was given to the wife for life. William L. Hertzell testified that, in a conversation with deceased about his will, the deceased

## MATTER OF RUSER.

said he had left all his property to his wife for life, and at her death it was to go to the children.

JOSEPH S. WOOD, *for proponent.*

CHARLES F. IRWIN, *for Charles Ruser, next of kin.*

THE SURROGATE.—This court has power to admit to probate a lost or destroyed will, but it cannot exercise such power unless “its provisions are clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness” (Code, §§ 1865, 2621). In this case, the execution of the will, and its existence since the death of the alleged testator, have been sufficiently established, and the only question for consideration is, whether the contents have been proven in such a manner as to satisfy the requirements of the statute. That the rule is strict and technical furnishes no reason for relaxing it. It was enacted for a wise purpose. If it may be departed from at all, it would throw open the door to much abuse and lead to great injustice in many cases.

Where no correct copy or draft, duly verified to be such, is produced, then the provisions of the will must be clearly and distinctly proven by each of two or more credible witnesses. It will not suffice to prove one provision by two or more witnesses, and another provision, in the same way, by others; but each of the witnesses must be able to testify to all of the disposing parts of the will. Nor can the proven declaration of its contents by the testator be regarded as of any weight in establishing the will. It was so held in the case of *Collyer v. Collyer* (4 *Dem.*, 53).

None of the witnesses, who saw the will in this instance, are able to state clearly and distinctly its provisions. Mr. McClellan, a careful lawyer, who drew the will, says it either gave the whole estate to the wife absolutely, or it gave it to her for life with remainder to his children, he cannot say which, but, he thinks, the former. This lacks the elements of clearness and distinctness which the statute exacts, and, therefore, he will not answer the purpose of one of the two requisite witnesses. Two other witnesses, who saw the will, testified that they did not read the whole of it. One says he read far enough to see that the deceased left the property to his wife, or something to that effect, while the other says he read it only so far as to see that the estate was given to the wife for life.

Aside from any consideration of the statute, it would be impossible, from this testimony, to determine with any degree of accuracy, what were the provisions of the will; whether it gave the estate to the widow absolutely, or for life or widowhood, and then to the children in equal shares. But as neither of these witnesses read the whole will, or otherwise knew all its provisions, their testimony is of no appreciable value; and as the statute does not provide that the declarations of the testator shall be received as an element in the evidence necessary, or competent, to establish a lost will, such evidence must be disregarded.

A stipulation, signed by counsel for the respective parties, is presented, by which, among other things, it was agreed that all of the estate was devised and bequeathed to the widow for life, with remainder to his

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children. In regard to this, it is sufficient to say that a lost will cannot be admitted to probate upon the agreement of counsel. If it could, then, by a like agreement, an existing will could be so admitted without the examination of any witnesses whatever. This court must be controlled, in its action, by the evidence the statute requires.

For these reasons, probate of the alleged will is refused.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
 SURROGATE.—February, 1888.

TODD v. DIBBLE.

*In the matter of the probate of the will of MARY MASTERTON, deceased.*

The *interest* which will render a person incompetent to "be examined as a witness" (under the rule established by Code Civ. Pro., § 829), as to conversations with the decedent, upon an application for the probate of a will, must be a present, certain and vested one; an interest uncertain, remote or contingent is not a ground of exclusion.

Hobart v. Hobart, 62 N. Y., 80—followed.

Upon an application for the probate of a will, it appeared that M., the decedent, and C. were two unmarried sisters who had lived for years together, owning and enjoying certain property in common. The alleged will dated August, 1878, gave the bulk of the estate to C., for life, with remainder to the family of T., who was nominated executor, and was one of the subscribing witnesses. Subsequently C., being the sole heir and next of kin of decedent, apparently ignorant of the existence of the will of M., obtained letters of administration upon her estate, sold certain of the real property affected, and died, leaving a will whereby she bequeathed \$1,000 to T., who was called as a witness by contestant, and asked to state conversations, had by him with M.,

## TODD V. DIBBLE.

bearing on the subject in controversy. Upon objection that T. was disqualified by *interest*, since the admission of M.'s will would, in effect, deprive him of the legacy bequeathed by C.,—

*Held*, that he was competent to answer.

THIS was a proceeding to prove a paper propounded for probate as the last will and testament of Mary Masterton, bearing date August 9, 1878. She had a sister, Caroline Masterton, both of whom were maiden ladies residing at Tarrytown together, and owning and enjoying more or less real and personal estate wholly, or in part, in common. The alleged will was executed by Mary at Albany while she was on a visit to her cousin, Robert F. Todd, and his family. Other than her sister, she had no nearer relatives than cousins.

She died at Tarrytown in 1883, shortly after which event, Caroline, being the only heir-at-law and next of kin, and apparently ignorant of the existence of a will, applied for and obtained letters of administration of the estate. She at once took possession, and sold and conveyed some of the real estate, all of which proceedings were known to Robert F. Todd, the person who wrote Mary's will, by which the bulk of the estate was devised and bequeathed to Caroline for life, with remainder to his family, and in which he was named as executor, and to which he was one of the subscribing witnesses. Subsequently, Caroline made an alleged will disposing of her whole estate, including the portion she claimed to have received as such heir and next of kin of Mary, and died in 1887. Shortly thereafter, Mary's will was offered for probate, whereupon



Caroline's was offered with a like view. Objections were filed to both, and testimony taken.

This case was now submitted, while the other one was still pending. In this case the Rev. John A. Todd, D. D., who was named as a legatee in Caroline's will to the extent of \$1,000, was called as a witness by the contestant, and, among other things, was asked to state certain conversations he had had with Mary bearing upon the subject of the controversy. This was objected to, on the ground that he was incompetent by reason of interest in the result, under § 829 of the Code, as the admission of Mary's will to probate would, in effect, deprive him of the legacy given him by Caroline. The evidence was taken subject to the objection.

L. T. YALE, *for proponent.*

ROBERT F. TODD, and J. S. MILLARD, *for Harriet Dibble, heir-at-law.*

THE SURROGATE.—Although it may have little bearing upon the final result of this case, it is proper that, in the outset, the objection to the testimony of the Rev. Doctor Todd, should be considered and disposed of. It seemed to be conceded that, if this will were established, he would be deprived of his legacy under Caroline's will; but the latter is contested, and it is yet uncertain whether it will be admitted to or refused probate. This element of uncertainty rendered him competent to testify to Mary's declarations. To render him incompetent, his interest must be a present, certain and vested one, and not an interest uncertain, remote, or contingent (*Hobart v. Hobart*, 62 *N. Y.*,

80). The objection taken is, therefore, overruled, and the testimony is received as taken. Any declarations made by Caroline, in the absence of Mary, must be disregarded, and it was so stated during the progress of the case.

It is not proposed here to enter into a minute examination of the testimony bearing upon the merits of the case, nor to pass judgment upon the amount of faith to be reposed in the somewhat remarkable evidence given by the proponent himself. In spite of the mists in which it is shrouded by his testimony, by the aid of other facts it seems very clear that the will in question was properly executed by a competent testatrix. By some of her letters and by oral evidence, it appears that she wished the fact of her having made a will to be kept from the knowledge of her sister. Her subsequent declarations in Caroline's presence of an intention to make a will, and of the disposition she would make of certain articles, were evidently intended to confirm her sister in the belief that none had been made. It is unimportant, perhaps, to know what her reasons therefor were, nor is it needful to speculate upon the effect a contrary course might have had in the way of avoiding litigation.

The usual decree admitting the will to probate will be entered, with costs to the proponent out of the fund.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—February, 1888.

QUIN *v.* HILL.

*In the matter of the estates of FRANK H. W. QUIN  
and FANNY G. QUIN, infants.*

A parent, as natural guardian of an infant beneficially interested under the will of a decedent, has no standing to apply for a revocation of the executor's letters,—it being requisite, under Code Civ. Pro., § 2685, that petitioner should be "a creditor or person interested in the estate."

In such a case, while the natural guardian may petition, pursuant to Code Civ. Pro., § 2846, for an order directing the general guardian of the property of the infant to apply the same to the support and education of the latter, he cannot proceed against the executors to such an end. Nor will a Surrogate's court direct the general guardian to pay over money, for the purposes indicated, to the natural guardian,—the latter not being amenable to the court for the proper disposition thereof.

THE petition of Henry W. Quin, Jr., the father of Frank H. W. Quin and Fanny G. Quin, infants, set forth that an order was made by this court, on or about September 27th, 1886, by which the Farmers Loan & Trust Company, the guardian of the estates of said infants was ordered to pay, out of the money in its possession belonging to them, to Henry W. Quin, Jr., their father, the sum of twelve hundred dollars, for the expenses already incurred by him for their support, maintenance and education, and also the sum of three hundred dollars, quarterly, from June 5th, 1886, until the further order of the court; that, since the entry of said order, the petitioner had received under the same, seven hundred and fifty dol-

## QUIN V. HILL.

lars, exclusive of said twelve hundred dollars; that said Frank was now in his sixteenth year; that, relying upon said order, the petitioner, one year ago last fall, sent him to an academy in Massachusetts, and had expended large sums for his board and tuition; that, on an accounting of the executors of the will of John G. Hill, deceased, under which these infants were beneficiaries, a decree was entered, June 5th, 1885, by which the total net amount of the personal estate was ascertained to be about \$160,000; that the executors could have placed in the possession of said guardian an amount sufficient to enable it to pay the moneys mentioned in said order; and prayed that said executors and said guardian be cited to show cause why the former should not place in possession of the latter, a sum of money sufficient to enable the guardian to comply with the terms of the order, and why the guardian should not pay the same to the petitioner for the purposes therein specified.

To this petition, on the return of the citation, the executors, Edward Petit and Frances C. Hill, filed an answer, in which they stated, among other things, that they were not parties to the proceeding which resulted in the order of September 27th, 1886, and did not appear therein; that the widow of decedent (Frances C. Hill) was, under the will, entitled to an annuity of \$5,000, and Margaret E. Weston to an annuity of \$500, both payable semiannually, and which are, by the will, made the first charges upon the estate, and that they were still living; that moneys have been paid by the executors to, or on account of, said infants, and they have been so paid upwards of \$800

more than they were entitled to receive after the preferred annuities of the widow and Mrs. Weston were paid; that the guardian applied to this court in December, 1886, for an order directing the executors to pay over to it a moiety of the residuary estate, which application was denied; that the decree on accounting in 1885 was appealed from, and affirmed.

EDWARD F. BROWN, *for petitioner*

T. H. RODMAN, *for executors.*

THE SURROGATE.—Of course, the executors are not bound by the order of September, 1886, as they were, in no way, parties to that proceeding, and they have a right to require the principle involved in it, as it is sought to be used against them here, to be considered afresh. Probably that order was made almost as a matter of course, both parties being willing to receive the money, the one through the other. It does not appear that, at that time, the guardian, as such, had any funds. This court had, by the decree on the accounting, in June, 1885, determined that the annuities to the widow and to Mrs. Weston, by the terms of the will, had a preference of payment out of income, and that the executors should retain and invest the whole fund, in order that it should earn sufficient to meet such payments. This decree, on appeal was affirmed. When the order of September, 1886, was made, directing the executors to pay certain funds to the guardian, the provisions of that decree probably escaped the attention of the court. In December,

1886, an application was made by the Trust Company for an order directing the executors to set apart and transfer to the Company, as guardian, one moiety of the residuary estate for the use of said minors. This application was denied. The present application seems to involve, to a certain extent, the considerations which induced a denial of that motion. Of course, if the guardian had funds in hand, there would be no occasion to ask this court to direct the executors to pay them moneys, to pay the petitioner.

Doubtless, the father of these minors may, under § 2846 of the Code, apply for an order directing the guardian to apply the income or, if needful, a part of the principal of the fund to their education and support, but he does not seem to be empowered to proceed against the executors, to any such end. That duty devolved upon the guardian, who has already as is seen, made an effort in that direction, and failed. Besides, an order cannot properly be made, directing the guardian to pay over money, for the purposes of education and support, to a person who is in no way amenable to this court for its application. Substantially, this question was determined in the case of *Houghton v. Watson* (1 *Dem.*, 299). The proper order, where it appears to be advisable that moneys should be applied to such purposes, would be one directing the *guardian* so to apply them. The responsibility would then be placed upon one who would be answerable here for the faithful performance of the duty. If it saw fit to hand the money to the father to be applied, and it were misappropriated by him, the

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MATTER OF BEEBE.

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guardian would be liable. These reasons require that the present application be denied.

If it were necessary to consider the matter on its merits, it would also fail. The statements submitted show that the present net income is insufficient to pay the annuities, which have a preference.

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SUBSEQUENTLY, the same petitioner, as guardian of the persons of the minors, presented a petition praying for a citation to the executor to show cause, for reasons assigned, why they should not be removed. As it is understood, he is only the natural guardian. According to § 2685 of the Code, such application can be made only by a person interested in the estate. He has no such interest, and his prayer must, therefore, be denied.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—March, 1888.

MATTER OF BEEBE.

*In the matter of the probate of the will of SARAH J.  
BEEBE, deceased.*

*It seems to be no ground for rejecting an alleged will, that its provisions are obscure and difficult of interpretation.*

The paper propounded as decedent's will was, substantially, as follows:

"After my mother's death, my cousin, S., is my heir. This writing is instead of a formal will which I intend to make. M. B. executrix."

"Witnesses:

M. B.

M. J. B."

[Signature]

[Date.]

## MATTER OF BEEBE.

*Held*, that on due proof of the *factum*, including the declaration of the testamentary character of the document, the petition for probate must be granted.

*Ash v. Ash*, 10 *Jur.*, *N. S.*, 142—distinguished.

A PAPER writing, of which the following is a copy, was propounded for probate by Mary Berwick, the executrix therein named: to wit:

"After my mother's death, my cousin, Sallie B. Williams, of 1501, North 10th St., Philadelphia, Penn., is my heir. This writing is instead of a formal will which I intend to make. Mary Berwick executrix."

"Witnesses:

Sarah J. Beebe"

"Mary Berwick"

"M. J. Berwick," "Yonkers, N. Y., July 13th, 1886."

On the return day of the citation, the witnesses were not present, but the question was raised, as to whether the paper propounded, was, on its face, a will. Mrs. Beebe, the mother of the deceased, was her only heir and next of kin.

J. W. ALEXANDER, *for proponent.*

R. E. PRIME, *for the mother.*

THE SURROGATE.—Assuming that the subscribing witnesses can testify to the observance of the statutory requirements essential to the valid execution of a will, among which is a declaration by her that it was her last will and testament, then, I think, it must be regarded as such. The paper itself is exceedingly informal, which she knew, and declared her intention to make a "formal" one, which intention seems not to have been carried into effect. She does not state that she intended to make any different disposition of



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SMITH v. COUP.

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her estate. This is unlike the case of *Ash v. Ash* (10 *Jur., N. S.*, 142), where the testator said in his will: "I propose to give the residue by codicil, or otherwise to let it devolve as if I had died intestate," and he left no codicil. He was held not to have disposed of the residue.

It is no ground for rejecting a will, that its provisions are obscure and difficult of interpretation. But such obscurity and difficulty do not seem to arise here; for, where a man devises lands to his heir, after the death of his wife, though no estate is given to the wife in express terms, she shall have an estate for life by implication (1 *Vent.*, 376). Probably, had the deceased made a formal will, she would have given her whole estate to her mother for life, with remainder to her cousin. This paper seems to have been drawn and executed provisionally, to stand as her will in case she failed, from any cause, to reduce it to what she regarded as more formal in its character. This she did not do, and, therefore, on proper proof of due execution being produced, it must be admitted to probate as her last will and testament.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—March, 1888.

SMITH v. COUP.

*In the matter of the estate of ISAAC B. SMITH, deceased.*

A Surrogate's court will deny a petition asking for a sale of all of a dece-

## SMITH V. COUP.

dent's real property for the payment of debts, where any portion of that property is, by the will, expressly charged therewith.

The executrix of decedent's will having presented a petition, under Code Civ. Pro., § 2749, praying for a decree directing the disposition of the real property for the payment of debts, it appeared that the disposing portion of the will commenced as follows: "After all my just debts are paid;" and then devised all of decedent's real property in successive clauses, to designated persons.—

*Held*, that the real property was "devised, expressly charged with the payment of debts" (Code, *ubi supra*), and that the court was, by the statute deprived of jurisdiction to entertain the application.

The judicial rule governing the order of application of a decedent's assets, to the payment of debts—declared.

Matter of Rosenfield, 5 *Dem.*, 251; Matter of Fox, 52 *N. Y.*, 530—followed.

In January, 1887, the will of Isaac B. Smith, late of Yonkers, was admitted to probate. The first disposing part of the will commenced as follows: "After all my just debts are paid;" he then devised certain specific real estate to his daughter, Nellie R. Smith, "subject, however, to the condition that she do fully pay and discharge all my funeral expenses, and also pay to my daughter, Kate A. Coup, the sum of fifty (50) dollars, all such payments to be made within sixty days after my decease." He next devised to his wife, Sarah C. Smith, for life or widowhood, certain other specific real estate, with remainder to Mrs. Coup. He then devised and bequeathed the residue of his estate, real and personal, to his said wife absolutely, which provisions for his wife were declared to be in lieu of dower.

Recently, the executrix filed a petition, with a view to the sale of all of the lands devised, for the payment of the testator's debts, in which it was alleged that there was not sufficient personal estate to pay the same, and that they were not a lien or charge upon

## SMITH V. COUP.

the real estate. The contestant, however, claimed that the real estate is, by the terms of the will, charged with the payment thereof.

R. E. PRIME, *for petitioner.*

JAMES M. HUNT, *for contestant.*

THE SURROGATE.—Of course, if the debts be a charge upon the real estate of the testator, this court has no jurisdiction to order a sale for their payment. That duty will devolve upon another court. The general rule is, that a deceased person's estate is to be applied to the payment of his debts, in the following order : 1st. The general personal estate ; 2d. Estates specifically devised for the payment of debts ; 3d. Estates descended ; 4th. Estates specifically devised, though charged generally with the payment of debts. And it requires express words, or the clear intent of the testator, to disturb this order (*Livingston v. Newkirk*, 3 *Johns. Ch.*, 312; *Livingston v. Livingston*, *id.*, 148).

But the personal estate must be first resorted to, even where the real estate is so charged ; and even where the testator gives his personal estate, he is supposed to give it subject to the payment of his debts, that being the first fund available for the purpose ; and when he charges his real estate with the payment of his debts, he is supposed so to charge it with the payment of such debts as may remain after his personal estate is exhausted. There is, however, nothing in the will, in this case, to show that the testator intended to exonerate the personal estate from such payment.

## MATTER OF TYLER.

It is immaterial to inquire here, whether the charge of the debts upon the realty, if there be such charge, is upon specific portions, or upon the whole, as the fact that they are charged upon any portion of it, will deprive this court of jurisdiction to entertain the application.

There can be no doubt that the testator did charge his debts upon real estate. It has been frequently and uniformly held that the devise, following the words: "After all my debts are paid," clearly indicate an intention to make the lands devised subject to the debts. It is sufficient to cite 2 Jarm. on Wills (5th Am. ed.), 535, 536; Matter of will of Fox (52 N. Y., 530); Matter of Rosenfield (5 Dem., 251).

Petition dismissed.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—March, 1888.

## MATTER OF TYLER.

*In the matter of the estate of MARIA TYLER, deceased.*

In selecting a person to act as administrator, with the will of a decedent annexed, the provisions of 2 R. S., 75, § 33,—which prefers the guardian of a minor, entitled, to "creditors and other persons,"—are to be regarded, in connection with Code Civ. Pro., § 2043.

Therefore, the general guardian of an infant sole residuary legatee, "being in all respects competent," is absolutely entitled to letters of administration, *c. t. a.*, where the person nominated executor is dead.

THE petition showed that, in February, 1886, no

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MATTER OF TYLER.

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will of Mrs. Tyler having been found, letters of administration on her estate were duly granted to Monmouth G. Hart, the present petitioner; that, on January 20th, 1888, a will of decedent was found, the executors named in which were dead, and which will had been duly admitted to probate, and the letters of administration revoked; that the petitioner was now the general guardian of Carrie E. Tyler, an infant, who was the sole residuary legatee under the will; that the general legatees were William Henry Davids, who resided in the State of Nevada, and Warren Davids, who resided in Brooklyn, N. Y., and who had duly renounced his right to letters of administration with the will annexed. The prayer of the petition was that such letters be granted to him, or to such person as the Surrogate might appoint, or that all persons having a prior right, who have not renounced, be cited to show cause why letters should not be granted to him.

WM. A. WOODWORTH, *for petitioner.*

THE SURROGATE.—Among other things, § 2643 of the Code provides that letters of administration with the will annexed must be issued, upon the application of a creditor or person interested in the estate, as follows: 1st, to one or more of the residuary legatees, who are qualified to act as administrators; and 2d, if there is no such residuary legatee, or none who will accept, then to one or more of the principal or specific legatees so qualified. After other provisions, not material here, the section finally authorizes the Sur-

MATTER OF TYLER.

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rogate to issue such letters to any proper person designated by him.

By 2 R. S., 74, § 27, as amended in 1867 (Chap. 782), it is provided that, if any of the persons entitled to administer in a case of intestacy be minors, administration may be granted to their guardians. It has been held that a mere executor is "a person interested in the estate" of his testator, and it seems to follow that the general guardian of a minor legatee would, as such, be interested in the estate from which the legacy is derived. Hence, he may petition for the issuance of letters of administration with the will annexed. Section 33 of 2 R. S., 75, provides that, where any person who would otherwise be entitled to letters of administration as next of kin, or to letters of administration with the will annexed as residuary or specific legatee, shall be a minor, such letters shall be granted to his guardian, being in all respects competent, in preference to creditors or other persons. This section is unrepealed, and therefore settles the question here presented, as to whether the letters, in this case, can be issued to the guardian, as such.

There would have been no doubt on this subject, were it not for the habit which obtains of regarding the Code as a new dispensation, and as furnishing the only rule for guidance. It will be seen that § 2643 of the Code is substantially the same as 2 R. S., 71, § 14, which it supersedes. The latter declares that letters of administration with the will annexed shall be issued "in the same manner and under the like regulations and restrictions as letters of administration in case of intestacy." The former says such

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MATTER OF BOWNE.

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letters shall be issued to "one or more residuary legatees, who are qualified to act as administrators." Both exclude minors. Section 32 of the R. S. declares a person under the age of twenty-one years incompetent to act, and then we come to § 33, above quoted, which, being in force, applies as well in this case as under the former practice.

The petitioner, being the guardian of the sole residuary legatee, is qualified to act, and as no person has a prior or equal right to the letters which he is entitled to receive, no citation need be issued.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—April, 1888.

## MATTER OF BOWNE.

*In the matter of the estate of ELIAS C. BOWNE, deceased.*

A decree of a Surrogate's court, admitting or rejecting a will presented for probate, is "a judgment," within the meaning of Code Civ. Pro., § 721, which is made applicable to such a court by id., § 2538, and protects a "judgment of a court of record" from impairment, by reason of the appearance, by attorney, of an infant party, if the judgment be in his favor. But where the will is admitted, the decree cannot be said to be in favor of an infant contestant.

The parent of an infant party to a special proceeding in a Surrogate's court has no authority, in his capacity as guardian in socage or by nature, to appear as guardian ad litem for his ward.

Seven years after decedent's will was admitted to probate, application was made for an order, to be entered, *nunc pro tunc*, appointing a guardian ad litem of an infant contestant, in the special proceeding instituted to procure probate.—

## MATTER OF BOWNE.

*Held*, that the court was without jurisdiction to grant the order sought; the application for which was an attempt to forestall the infant's right, on attaining majority, to move to vacate the decree on account of the failure to procure an appointment of such a guardian in due course.

THIS was an application for an order for the appointment of a special guardian for an infant, in proceedings to prove a will, to be entered *nunc pro tunc*, as of May 25th, 1881. From the affidavit presented, it appeared that Elias C. Bowne, deceased, left, among his heirs-at-law, some infant children; that, on the proceeding to prove his will, in May, 1881, the infants were duly cited; that, on the return of the citation, Mary Dusenbury, the mother and guardian in socage of said infants, appeared in person and by Charles H. Ostrander, Esq., her attorney, and contested said will; that, as counsel for proponent then supposed, said attorney had been appointed the special guardian for said minors; that said Ostrander claimed, on said probate, to appear for said minors and also for Mary Dusenbury, their general guardian. It also appeared that she was not then such general guardian, but was appointed as such at some period subsequent to the admission of the contested will to probate.

ODIE CLOSE, for the application :

Cited Code Civ. Pro., §§ 721, 722, 723 and 2538; Matter of Becker (28 *Hun*, 207); Jenkins v. Young (43 *id.*, 194).

THE SURROGATE.—The question presented, is not one addressed to the discretion of the court, but relates to its jurisdiction to grant the order sought. It will



## MATTER OF BOWNE.

be seen, by reference to § 2538 of the Code, that §§ 721, etc., are made applicable to Surrogates' courts, so that the power granted by those sections may be exercised here, but only when the case is brought within their provisions. Doubtless, it was irregular to proceed to prove the will and admit it to probate without having, on the return day of the citation, appointed a special guardian for the minors. The mother, as guardian in socage, by nature, or otherwise, could not, except as general guardian, appear for them; and she was not then their general guardian; nor could the attorney appear for them. It is true, the failure to appoint a special guardian did not render the proceeding void, but voidable only by the minors on attaining their majority; as is abundantly shown by the cases in *Hun*, cited by the learned counsel. I cannot see that they affect the question here presented.

It is expressly provided by subd. 7 of § 721, that no judgment of a court of record shall be impaired or affected by reason of the appearance, by attorney, of an infant party, if the judgment is *in his favor*. A decree on probate must be treated as a judgment, within the spirit and meaning of the act. Hence it would appear that, as the decree was *against* the infants as contestants of the will, it certainly cannot be regarded as being in their favor; and, therefore, to make the order sought would be violating the provisions of the act. Without the statutory power conferred thereby, this court, not being a court of general jurisdiction, would be able to correct but few of the defects and imperfections therein mentioned.

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MATTER OF DEPEW.

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This minor, for it is understood that all but one of them are now over twenty-one, will have a right, when of age, to seek to avoid the decree because of the omission to appoint a special guardian. It is an existing right, but cannot yet be exercised. Can this court deprive her of that right, by making the order sought? Clearly not. No provision of the common-law or of the Code can be found, warranting us to proceed to such an extent.

Application denied.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—April, 1888.

## MATTER OF DEPEW.

*In the matter of the judicial settlement of the account  
of THOMAS NELSON, as executor of the will of  
CHARLES A. G. DEPEW, deceased.*

Where two or more persons are nominated executors in a will, and one of them, alone, qualifies, receives full commissions as executor, and dies,—and thereafter another of the nominees, receives letters and acts, the latter is entitled, in like manner as an administrator *de bonis non*, to full commissions on moneys received and paid out by him, and half-commissions on moneys received and held.

The case appears to be unprovided for by statute.

THE testator, by his will dated August 11th, 1873, appointed three executors, Thomas Nelson, Coffin S. Brown and William S. Tompkins. On November 26th, 1877, letters testamentary thereon were granted to

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MATTER OF DEPEW.

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said Coffin S. Brown, he alone qualifying as executor. On July 2d, 1885, he died. After his death, and on August 10th, 1885, letters testamentary thereon were granted to said Thomas Nelson, one of the other executors in said will named, and he now, for the first time since his appointment, presented his accounts for settlement.

The executor, Brown, during his lifetime, made and filed, on three several occasions, his accounts, and decrees were entered thereon, and, after his death, his executors made an account and passed over to Nelson, the present executor, the moneys and other property of the estate of said Depew, deceased, amounting to \$16,000. The former executor, Brown, received, in his lifetime, the commissions provided by statute. The executor, Thomas Nelson, on this accounting, submitted the question as to the amount of commissions to which he was now entitled. All the money received by him was \$43,132.71. Of this, he had paid out \$13,798.96; and the balance of principal he had retained and invested under the provisions of the will.

LENT & HERRICK, *for the executor.*

THE SURROGATE.—The question here to be considered is in regard to the amount of the commissions, to which the present executor is entitled, on this accounting. There seems to be no statutory provision directly affecting it. Full commissions are allowable to a temporary administrator, where he does not subsequently become the administrator in chief, or the executor of a will, pending a contest over which, he is appointed such temporary administrator (Code,

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MATTER OF THOMPSON.

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§ 2738). So, too, if a sole executor die leaving some portion of the estate unadministered, and an administrator with the will annexed be appointed, the latter will be entitled to full commissions on the portions coming into his hands as such; and the same principle governs in the case of an administrator *de bonis non*. I think it applies with equal force to an executor, one of two or more named in a will, who does not act or qualify until after the death of one who did so qualify and act. He, in effect, is the successor, and takes up the estate where his predecessor left it, just as does the administrator in chief, *de bonis non*, or with the will annexed, as above stated, and is entitled to commissions in like manner. The decree in this matter will, therefore, award full commissions to the present executor on the sum received and paid out, and half-commissions, only, on the amount received and not paid out.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—April, 1888.

## MATTER OF THOMPSON.

*In the matter of the estate of LILLIE S. THOMPSON,  
deceased.*

Questions relating to the sufficiency and justification of sureties, in the bond of an administrator of the estate of an intestate, are to be determined in accordance with the provisions of Code Civ. Pro., § 813.

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MATTER OF THOMPSON.

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Where, of two persons, offered as sureties on such a bond in a penalty of \$15,000, one was able to justify only in the sum of \$10,000,—

*Held*, that the other, justifying in an amount sufficient to cover the penalty for himself, might be allowed to "contribute to make up the sum" of \$5,000 for the former.

APPLICATION for letters of administration.

DE WITT & SPOOR, *for petitioner.*

THE SURROGATE.—Mrs. Thompson, a widow, died intestate, leaving an only child, a minor. Mr. John Van Dyck had been appointed her general guardian, and as such, makes this application. It appears that the intestate left a personal estate amounting to about \$7,500. The applicant presents a bond, in the ordinary form, and in a penalty of \$15,000, in which his wife Eleanor F. Van Dyck, and one Austin S. Kibbee are the sureties, the wife justifying in the sum of \$10,000, and Mr. Kibbee in \$20,000. Is this bond sufficient under § 813 of the Code as amended by chap. 521 of the Laws of 1885, made applicable to such bonds?

Under the Revised Statutes (2 R. S., 77, § 42), it would have been so considered, as that section provided that "every person appointed administrator shall, before receiving letters, execute a bond to the people of this state, with two or more competent sureties, *to be approved by the Surrogate*, and to be jointly and severally bound." Their competency and sufficiency were left for the Surrogate to determine, in any way he saw fit. There was no provision requiring them to justify in any sum whatever. But now, § 812 of the Code requires that each of the two sureties, required in a case like this, shall make an affi-

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MATTER OF THOMPSON.

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davit to the effect that he is worth the penalty of the bond, etc. Then § 813 provides for just this case. Of the two sureties, one is able to justify in the amount of the penalty (and more too), and the other is not. Hence the court, exercising its discretion, will allow the sum in which the latter is required to justify to be made up by the justification of two or more sureties, of which she is one and Mr. Kibbee the other.

The fact that he has justified in a larger sum than the amount of the penalty, renders him an additional surety to make up, to the extent of the excess, the amount which the other one lacks. The last clause of the section would prevent him from thus aiding more than one surety. Two are required by law to justify, of whom he is one. He swears to an amount sufficient to cover the penalty for himself, and \$5,000 in excess thereof, and he then contributes to make up the sum for the other. It seems to me it was so intended. The Commissioners, in their note to this section, say: "This section is so framed as to prevent a party, who is required to furnish two sureties, justifying in thirty thousand dollars each, from furnishing, for instance, one to justify in fifty thousand dollars, and two in five thousand each." In that case, he would be contributing to make up the sum for more than one. The inference is, that he might so contribute for one,—that if he had justified in fifty thousand and another in ten thousand dollars, the bond would be deemed sufficient.

That is this case, and the bond presented is, therefore, approved.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—April, 1888.

JENKINS v. SHAFFER.

*In the matter of the estate of CATHARINE SHAFFER,  
deceased.*

A temporary administrator cannot saddle upon his decedent's estate a fee paid by him to an indemnity company as the consideration for its going bail for him,—the expenditure being neither within the line of his duty as a prospective representative, nor necessary and reasonable, within the meaning of Code Civ. Pro., § 2562.

PENDING a contest over an alleged will of decedent, which was finally refused probate, James H. Jenkins was appointed temporary administrator, giving a bond with the New York Bond & Indemnity Company as the surety. On his accounting, he claimed, as a charge against the estate, the sum of \$45, which he paid said Company to become such surety. This item was objected to by George W. Shaffer, the surviving husband of the deceased.

JOSEPH H. PORTER, *for temporary administrator.*

JACOB FROMME, *for contestant.*

THE SURROGATE.—The objection seems to be well taken. It would not appear that the expenditure could fairly be held to be comprehended within the lines of his duty as a prospective representative; nor as being necessary and reasonable, under § 2562. If he could

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CROMWELL v. PHIPPS.

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be allowed a sum paid to any such company for such a purpose, he might, with equal propriety, be allowed any like sum paid to individuals to become his sureties. It seems to be a matter entirely personal to the administrator. If he cannot furnish the necessary bond, he cannot receive his appointment. The estate or persons in interest, are under no obligation to refund to him the money he may have expended in procuring his sureties, whoever or whatever they may be. The item is, therefore, disallowed.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—May, 1888.

CROMWELL v. PHIPPS.

*In the matter of the disposition of the real property  
of JOSEPH BELLESHEIM, deceased, for the pay-  
ment of his debts.*

A Surrogate's court has no jurisdiction, in a special proceeding instituted under Code Civ. Pro., § 2749, for the disposition of a decedent's real property for the payment of his debts, to compel a purchaser at the instance of a freeholder appointed to sell the same, to accept the deed and pay the balance of the purchase money.

The doctrine of *Wolfe v. Lynch*, 2 *Dem.*, 610, on this point re-asserted.

The general rule of courts of equity, as to who shall be parties to a controversy, does not prevail in such a court. The purchaser, not being made a party by the statute, cannot be deemed such, nor can he intervene and become a party, to the special proceeding.

The proof of absence for seven years or more, requisite to found a presumption of death, under Code Civ. Pro., § 841, need not be direct and positive; but such absence may be fairly inferred from facts which clearly point to that conclusion.



## CROMWELL V. PHIPPS.

A purchaser, upon a sale, under the statute, of a decedent's real property, having refused to complete the contract on the ground of a defect in the title, and the freeholder appointed to sell having moved to compel him to accept the deed and to pay the balance of the purchase money, it appeared that the premises in question had in November, 1851, been conveyed to Sarah B., and that, in 1861, "Sarah W., formerly B.," conveyed the same premises to the subsequent owner by a deed duly acknowledged,—the certificate of acknowledgment stating that S. W., the grantor, had been subjected to a private examination separate and apart from her husband. There was evidence of diligent and totally ineffectual efforts to ascertain facts concerning the existence of the grantor and her husband, and the fact of marriage.—*Held*,

1. That the consent of the husband, if any, was unnecessary, and the certificate of a separate examination, surplusage.
2. That, assuming the husband to have been, at the time of the conveyance by Sarah, a tenant by the curtesy initiate, he must be presumed to be dead, and his life estate extinguished.
3. That the purchaser should pay the balance of the purchase money, and accept the conveyance.

*Allen v. Reynolds*, 4 J. & S., 297—approved.

PURSUANT to a decree to that effect, David Cromwell, a freeholder appointed for the purpose, duly sold one of several parcels of decedent's real estate to Edward Lestrange Phipps, in February, 1888, for the sum of \$1,380, of which sum the purchaser paid ten per cent., in compliance with the terms of sale. In March following, on notice to the proper parties, a decree was duly entered confirming the sales. Subsequently, on being tendered a proper deed of conveyance of the premises, the purchaser declined to pay the balance of the purchase money and accept the deed on the ground of an alleged defect in the title to the premises. Whereupon, on an affidavit alleging said facts and on motion to the purchaser, the freeholder moved for an order requiring him to take title thereto and to comply with the terms of sale.

Affidavits in opposition were submitted, the most

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important facts shown thereby being, that the premises were, on November 1, 1851, conveyed to one Sarah S. Bogert of New York City, by deed which was duly recorded on June 3, 1852; and that Sarah S. Wood, formerly Bogert, of New York City, conveyed the same premises to Daniel B. Pierson of the same city, by deed dated March 28, 1861, and properly recorded May 30, 1862; the certificate of acknowledgment of the last mentioned deed being as follows:

“State of New York, }  
City & County of New York, } ss.:

On this twenty-eighth day of March, 1861, before me personally came Sarah S. Wood, to me personally known to be the same person mentioned and described in and who executed the foregoing conveyance, and acknowledged to me that she executed the same; and on a private examination by me made, separate and apart from her husband, acknowledged to me further, that she executed the same freely and without any fear or compulsion of her husband.

JAMES R. CUMMINGS, Notary Public.”

It further appeared that diligent search and inquiry were made for information, in regard to who the said Sarah S. Wood, formerly Bogert, and her husband were, and as to their marriage, without success, both in Mount Vernon, where the premises were situated, and in New York City, and that after exhausting all means of inquiry, no information on the subject had been obtained.

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FREDERICK WM. HOLLS, *for the motion.*

ISAAC N. MILLS, *opposed.*

THE SURROGATE.—I cannot divest my mind of the conviction that this court has no power to entertain and determine the question here presented. It was so held in the case of *Wolfe v. Lynch* (2 *Dem.*, 610), where reasons were given at length. That decision was reversed at General Term, the opinion on reversal being reported in 33 *Hun*, 309. Nothing to alter the views expressed by this court is uttered in that opinion. There is, however, this distinction between that case, and the present one. There, the application was made by the purchaser, while here, by the petitioner.

Surrogate's courts have jurisdiction only over parties interested in estates, either as executors, administrators, devisees, legatees, heirs at law, next of kin, husband or wife, creditors, assignees, guardians and wards, and such as the statute prescribes as parties—as, in this case, a freeholder appointed to sell. The matter in which this motion is made is known to the statute as a proceeding to mortgage, lease or sell real estate for the payment of decedent's debts. To this proceeding Mr. Phipps, the purchaser, is in no wise a party. He was a stranger throughout the proceeding which resulted in the decree of sale. The fact that he purchased the premises, did not make him a party to a proceeding which was ended, except the entry of a decree of distribution. It cannot be said that the general rule of courts of equity prevails as to who shall be parties in Surrogates' courts. It is

only those persons, or that class of persons, expressly designated in the statute, who can be such parties (Redf. Pr., 3d ed., 87). Nor do Surrogates' courts possess the general powers of courts of equity (*id.*, 54), such as the coercing of a purchaser to pay the money and take the title. Section 2752 of the Code specifies what persons shall be named in the petition for sale of real estate, and § 2754 directs as to what parties shall be cited, while the next section as amended in 1887 (chap. 147) provides that certain persons, among whom a purchaser is not named, may intervene and be made parties to the proceeding. The maxim, "*expressio unius est exclusio alterius*" is clearly applicable to exclude the purchaser as a party.

It seems to me that an executor, having power by the will to sell real estate, and having agreed to sell it to a stranger to the estate, who, for an alleged defect of title, or other cause, failed and refused to fulfill his contract, might, with equal propriety, come here and ask this court to make an order to compel the purchaser to pay the money and take his deed. The relation of the purchaser to the freeholder, in the one case, and that of the purchaser to the executor, in the other, seems to be precisely the same. Neither, by the act of purchase, becomes a *party* to the proceeding. If Mr. Phipps is not a party, then any order that might be made against him would, as is conceived, be a nullity. Suppose the order asked for here be made, and he refuse to obey it, what can next be done? Has the court any power to enforce obedience to an order it has no authority to make?

In the opinion in 33 *Hun*, stress is laid upon the

incidental powers conferred on Surrogates' courts, by subd. 11 of § 2481 of the Code. That subdivision provides that a Surrogate has power, "with respect to any matter not expressly provided for in the foregoing subdivisions of this section, to proceed, in all matters subject to the cognizance of his court, according to the course and practice of a court, having *by the common-law*, jurisdiction of such matters, except as otherwise prescribed by statute; and to exercise such incidental powers, as are necessary to carry into effect the powers expressly conferred." No court, by the common-law, had jurisdiction to order a sale of real estate of decedents for the payment of debts. By the hard and unjust rule of that law, land, descended or devised, was not liable to simple contract debts of the ancestor or testator (4 Kent's Comm., 419; 3 Blacks. Comm., 430). So that there is no course and practice of any common-law court for the Surrogate to pursue in this case. It is true, he has power, in a proper case, to direct a sale of real estate for the payment of decedents' debts. He may make a decree to that effect, and, on a report of sale made, may make a decree confirming it. The only other thing he is empowered by statute to do, as already stated, is to make a decree distributing the proceeds after they are paid into court.

I cannot conceive that the compelling payment by a purchaser at such a sale, not being a party to the proceeding, or adjudicating as to the validity of the title to the premises sold, can be an incident to the powers expressly conferred, with a view of carrying those powers into effect. It is the business of the ex-

ecutor, or other person making the sale, to collect the money from strangers, and not the Surrogate's, and when collected, to pay it into court. That act, in so far as the power conferred on the Surrogate is concerned, is not incident to it. "Incident," according to Jacob (Law Dict., Title "Incident"), is "a thing *necessarily* depending upon, appertaining to, or following another that is more worthy or principal." Thus, timber trees are incident to the freehold, and so is a right of way. The powers which were regarded by the courts as incidental to the express powers conferred upon Surrogates and their courts, will, many of them, be found enumerated in Dayton's Surr., 5, 6 (3d. ed.); Redf. Pr., 24 (1st. ed.) and fall within Mr. Jacob's definition. The enactment of the last paragraph of subd. 11 of § 2481 was intended to sanction and cover such and the like cases only, and not to furnish an excuse to travel afield in the exercise of powers unfettered by the term "incidental" in its strictest sense. Where an executor, having power to sell real estate for the payment of legacies, is required to account and pay a legacy, and it appears that the assets are insufficient for the purpose, and he has not sold the real estate, the power of the Surrogate to order it sold would seem to be more clearly possessed as incidental, than in the present case; and yet it has been held that he has no such power (*Bevan v. Cooper*, 72 *N. Y.*, 317—327).

It is difficult to conceive that the trial of so grave a question as that relating to the title to real estate was intended to be classed among powers which are merely incident to the main power to order its sale. The in-

cidental would thus appear to be greater than the chief power granted. No direct or incidental power, however, can be exercised over a person not a party, except over witnesses, or persons guilty of contempt, and no person can be made a party by this court, other than such as the statute designates. By § 2547 of the Code, the Surrogate may send any disputed question as to title, or any other matter, in such a proceeding as this, to be tried before a jury at the circuit, or county court, but he can only do so when the dispute arises between parties. How can the question about the title, in this case, be sent to a jury, when but one party to it is in court. By saying that he is such party, and by coming in and submitting the question here does not render the stranger a party. Consent will not confer jurisdiction. Nevertheless, fully conscious of the fallibility of the human judgment, and out of respect for the decision of the appellate court, it is proposed to briefly consider the application upon its merits.

By § 3 of an Act of the legislature passed in 1860 (chap. 90), it was enacted that "Any married woman possessed of real estate as her separate property, may bargain, sell and convey such property, and enter into any contract in reference to the same, but no such conveyance or contract shall be valid without the assent in writing of her husband, except as hereinafter provided." It is, therefore, claimed on the part of the purchaser that, as the certificate of acknowledgment to her deed to Pierson shows that she was, at its date, in 1861, a married woman, and no written consent of the husband appears to have been given, the

title is defective. In 1862, that part of the act of 1860, requiring the written consent of the husband, was repealed by amendment (Chap. 172). In 1873, the Superior Court of N. Y., with the acts of 1849, 1860 and 1862, before it, in the case of *Allen v. Reynolds* (4 *J. & S.*, 297), held that, since the Act of 1849, the acknowledgment of a married woman to the execution of a deed, need not state that she, on a private examination, separate and apart from her husband, acknowledged that she executed it freely and without any fear or compulsion of her husband. So far as I can find, the correctness of that decision has not been questioned by any of the courts of this state. A certificate of that character is evidence only of the facts required or authorized to be stated (*Water Com'rs v. Lansing*, 45 *N. Y.*, 19; *Parr v. Greenbush*, 72 *id.*, 463). Therefore, that portion of the certificate should be disregarded. Hence, the only evidence we have in relation to her being a married woman, at the date of the execution of the deed, is, that she described herself as "Sarah S. Wood, formerly Bogert." That fact is, of itself, ambiguous in its character. She may have changed her name by marriage, by application to the county court, for the purpose of obtaining a legacy, or for some other cause.

But assuming that Mrs. Wood had a husband living at the time of the execution of the conveyance by her, the most that the husband could claim as an interest in the land at that time, if there were issue, would be a right as tenant by the curtesy initiate. It does not appear that there was issue of the marriage. All that we have, by way of positive evidence, was seizin



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in Mrs. Wood. Again, assuming that there were seizin, marriage and issue, then the husband had an initiate estate determinable at his death, whether consummate by her death, or not. In that case, § 841 of the Code, which is the same as 1 R. S., 749, § 6, except that it is made applicable to special proceedings, and is made to apply to persons without the United States, instead of beyond sea, would have to be considered in this connection. It is twenty-seven years ago, that the deed in question was given of premises at Mount Vernon, the grantor then being a resident of New York City. The affidavits show that diligent and exhaustive efforts have been made by the respective and intelligent counsel in both places, to ascertain something about Sarah S. Wood, formerly Bogert, and her husband, and about their marriage, which efforts have ended in complete failure. I do not understand that the proof of absence, for seven or more years, must be direct and positive, but such absence may be fairly inferred from facts which clearly point to that conclusion. Doubtless, it would have been more satisfactory, had the affidavit stated exactly what was done in that regard. Still, the quest has been made intelligently and with an honest effort, with the result stated. It follows that the husband, if there were one, is presumed to be dead.

It is not easy to understand what interest the husband, if there were one, had in the premises, if there were no issue, under the acts of 1848 and 1849, concerning the rights of married women. In the case of *Wing v. Schramm* (13 *Hun*, 377), Justice DYKMAN held that one thing intended by § 3 of the act of

1860 was to give the husband some control over the alienation of his wife's land, and that it was very reasonable to suppose that that was the only aim and intention of the section,—thus providing that such conveyance should not be valid against him and his marital rights without his written consent; and that, if such were the true construction, the grantee of the wife, without such consent, took a title valid against all the world, except the husband. This seems to be a fair and just construction of the act. Curtesy being out of the question, and the husband having no direct or contingent estate in the premises, we are remitted to the rule as to the presumption of death. In cases other than those provided for by statute, the courts have adopted a similar rule (*King v. Paddock*, 18 *Johns.*, 141; *Merritt v. Thompson*, 1 *Hilt.*, 550; *Eagle's Case*, 3 *Abb. Pr.*, 218; *McCartee v. Camel*, 1 *Barb. Ch.*, 455). There is no hesitation in applying the rule to a case of this nature, where no perceptible interest of the person supposed to be dead, could be affected if living, other than to enable him simply to act the part of an obstructionist.

Without considering other questions that spring from the facts, it is determined that there is no valid reason why the purchaser should not pay the purchase money and accept the conveyance.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—May, 1888.

O'CONNOR *v.* GIFFORD.

*In the matter of the judicial settlement of the account  
of WILLIAM P. O'CONNOR, as executor of the will  
of JOHN McEVoy, deceased.*

Testator's will, after directing the payment of his debts and funeral expenses, gave \$500 to his executors, to be expended by them in having masses said for the repose of his soul. The executor having paid out one half of this amount for the purpose specified, and about \$300 as funeral expenses, it was, upon the judicial settlement of his account, on a creditor's objection, that the amount paid for such expenses was "unauthorized in law, exorbitant and not justified,"—

*Held*, that the trust for masses was void in its creation, the expenditure for that purpose, unauthorized in law, and the sum paid therefor to be deemed assets in the executors' hands, with which he was chargeable.

*Holland v. Alcock*, 108 N. Y., 312—followed.

A portion of decedent's assets consisted of two Jersey City bonds, of the par value of \$1,000, each, which did not come into the executor's hands, but were taken by the residuary legatee, and sold, and the proceeds appropriated, by her. It appeared that the executor knew, during decedent's lifetime, and shortly before his death, of the ownership of the bonds, and was also aware, within a few months of the admission of the will to probate, of the existence of a liability on the part of decedent, for which the creditor afterward obtained judgment; also that the residuary legatee, who had the custody of decedent's effects, at the time of his death, repeatedly during six months denied having the bonds in her possession, sent the executor, in vain quests for them, to various persons and places, and finally confessed that she had sold them, stating that they had been given to her by decedent; which last named statement the executor did not believe.—

*Held*, that, in view of the indebtedness of the estate, the latter was guilty of neglect of a plain and urgent executorial duty in not taking prompt measures to recover the value of the property wrongfully converted; and that, by reason of his *devastavit*, he must be held liable for the amount of the bonds in question, as assets in his hands.

THE testator, after directing the payment of his

debts and funeral expenses, gave, by his will, five hundred dollars to his executors, to be expended by them in having masses said for the repose of his soul; three hundred dollars to his brother, Michael McEvoy; and devised and bequeathed the residue of his estate to his niece, Mary Ann Murphy. He gave his executors, William P. O'Connor and the Rev. Matthew Dowling, or the survivor of them, power to sell his real estate, of which he had two parcels at White Plains.

The testator died about April, 1883, and his will was admitted to probate in July, following. On November 30th, of the same year, Mary Ann Murphy conveyed said real estate to John A. Walsh, for the expressed consideration of \$1,500. By the account of proceedings filed by said O'Connor June 1st, 1885, he stated the amount of the personal estate which came to his hand (the other executor named, not acting), at \$1,444.32. This sum did not include two bonds of Jersey City, which were spoken of in Schedule G. of said account, as follows: "There were two bonds of Jersey City, of the par value of \$1,000 each, belonging to the deceased, which did not come into my hands. They were taken by the residuary legatee, Mary Ann Murphy, without my knowledge or consent, and sold by her. They were worth about \$2,060, and I respectfully insist that I am entitled to commissions on said amount, as though said bonds, or the proceeds thereof, had come into my hands." About the time of the filing of said account, Silas D. Gifford, as receiver, etc., of John M. Masterson, commenced by action the foreclosure of a mortgage, the payment of

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which had been guaranteed by the testator, in which action said executor was made a defendant, and which resulted in a deficiency judgment against the executor, to the amount of \$6,679.14, which said Gifford now held, in the character of assignee of said Masterson. The account showed that the executor expended the \$500 for masses. Other facts are sufficiently referred to in the opinion.

T. G. BARRY, *for executor.*

R. E. PRIME, *for Gifford, creditor.*

THE SURROGATE.—In the recently decided case of *Holland v. Alcock* (108 *N. Y.*, 312), the Court of Appeals held that, where the testator gave the residue of his estate, amounting to about \$10,000, to his executors “for the purpose of having prayers offered in a Roman Catholic church, to be by them selected, for the repose of my soul, and the souls of my family, and also the souls of all others who may be in purgatory,” the trust attempted to be created was void, because there was no beneficiary in existence or to come into existence, who was interested in or could demand an execution of the trust, and no defined or ascertainable living person had, or ever could have, any temporal interest in its performance. For the same reason, the trust attempted to be created by the will in this case is void.

The contestants' counsel did not base any objection upon this specific ground, but, seeming to class the \$500, attempted to be devoted to the saying of masses, with the charges for burial amounting to

about \$300, as funeral expenses, he objected that the sum of \$800, paid for such expenses was "unauthorized in law, exorbitant and not justified." Still, the objection may be regarded as broad enough to cover the question relating to the validity of the trust, which was void in its creation, and which has been executed in good faith. According to the case above cited, the expenditure for masses was "unauthorized in law." The case of *Holland v. Alcock* related to the will of Thomas Gunning. Smyth, the sole acting executor under that will, had an accounting before the Surrogate of New York, in which proceeding the validity of the trust for masses was recognized, without objection, and the propriety of the expenditure therefor was not questioned. No appeal was taken, and the Surrogate's decree in the matter was declared by the Supreme Court, in an action brought by the legatees to recover the sum paid for masses, to be binding and conclusive as to the correctness of the expenditure. But, in this case, there has been no adjudication of the question by any court, and it must be held, in accordance with the decision of the Court of Appeals, that the trust is void; and it follows, as a necessary sequence, that the payments made thereunder were unauthorized, and that the executor is chargeable therewith.

The executor credits himself with the full sum of \$500, paid for masses for the repose of the soul of the deceased, when his testimony shows that he so expended \$250 only, the other \$250 having been contributed by Mary Ann Murphy, and with which he charges himself. Of course, he cannot be credited

with the amount he paid, and should not be charged with the amount contributed.

A more serious question, in so far as the amount involved is concerned, arises as to the liability of the executor for the sum of the two Jersey City bonds, valued together at \$2,060. It seems to be well established that such acts of negligence or careless administration as defeat the rights of creditors or legatees, or parties entitled to distribution, amount to a *devastavit*, for if persons accept the trust of executors, they must perform it; they must use due diligence, and not suffer the estate to be injured by their neglect (Wms. on Ex'rs., 1636; *Lawson v. Copeland*, 2 *Bro. Ch. Cas.*, 156).

The facts, as disclosed by the testimony, are these. The executor knew, within a few months after the time of the admission of the will to probate, of the existence of the decedent's liability, for which the creditor subsequently obtained his judgment. He also knew, during the lifetime of the decedent and shortly before his death, that he was the owner of the Jersey City bonds. When he sought, after he became executor, on several occasions, to obtain possession of them, Mary Ann Murphy, who had the custody of the papers and effects of the deceased when he died, repeatedly, during six months, denied that she had them. She sent him to various persons and places, in a vain quest for them, and several times went to him and inquired if he had found those bonds yet; and finally, at the end of the six months, confessed to him that she had them all the time, and had recently sold them, claiming then that they been given to her by

the deceased. This the executor did not believe, for when he filed his verified account in this proceeding, he stated in it that these bonds belonged to the deceased, and insisted that he was entitled to his commissions on the amount of them. She had, therefore, at that time, in her hands, the proceeds of the real estate sold by her and also the proceeds of the sales of the bonds, together amounting to about \$3,500. This the executor then knew, and he also then knew of the claim of this creditor; yet he utterly neglected a very plain and urgent executorial duty in not taking prompt measures for the recovery of the value of the property wrongfully converted by Miss Murphy. Perhaps the reason why he did not do it, was a belief, based upon the advice of counsel, that the creditor would fail to obtain the judgment which he afterwards did. As between her, as residuary legatee and devisee, and himself as executor, had she been the only person interested in the estate, he might have been justified in tolerating her misconduct, but as between him and a claimant against the deceased, his negligence is gross and without excuse.

It is unnecessary to consider here the validity of the conveyance to the Rev. Mr. Walsh, as, assuming it to be void, this court has no incidental power, in this proceeding, to order a sale of the real estate for the payment of the creditor's claims (*Bevan v. Cooper*, 72 *N. Y.*, 317).

It is objected, by the executor's counsel, that the creditor cannot recover here, because he did not present his claim under the published notice to creditors to do so. Conceding that there was no such formal



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presentation of the claim, in this instance, as the statute contemplates, its only effect would be to limit his recovery in any *action* he might bring on it, to the amount of the assets remaining in the executor's hands unadministered at the commencement of the action, and to deprive him of the right to costs. The objection cannot avail in a proceeding like this. But the effect of this decision is to find, virtually, in the hands of the executor, one half the trust fund for masses, and the amount of the bonds in question.

A decree will be entered in accordance with the views above expressed.

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QUEENS COUNTY.—HON. A. N. WELLER, SURROGATE.—  
March, 1888.

## MATTER OF COOLEY.

*In the matter of the estate of RANDOLPH M. COOLEY,  
deceased.*

Money awarded by the Alabama Court of Claims, under the act of Congress, passed in 1882, on account of an "indirect claim," founded upon the payment of war-premiums for insurance, is to be deemed a gratuity to the claimant, and is protected from the demands of his creditors.

Where such money is, in fact, received by the administrator of the estate of an intestate claimant, it does not constitute assets of the estate, and is not applicable to the payment of the decedent's debts.

A Surrogate's court cannot, however, in such a case, direct payment thereof by the administrator to the relatives entitled. Their remedy is a civil action against him, for moneys had and received.

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Voluntary appearance, in such a court, of all the parties to a controversy does not confer power to determine the same, where the subject-matter is without its jurisdiction.

Taft v. Marsily, 47 Hun, 175—followed.

THIS was a hearing had in a special proceeding instituted to procure a judicial settlement of the account of Jonathan G. Kittle, as administrator of the estate of the intestate decedent. The facts are stated in the opinion.

DE WITT, LOCKMAN & DE WITT, *for administrator.*

T. M. WYATT, *for next of kin.*

THE SURROGATE.—Two very grave questions are presented by this accounting, viz. :

*First.* Whether or not the funds received by the accounting administrator are assets of the decedent's estate, and as such liable to be applied towards the payment of his debts, and

*Second.* Are the debts of decedent barred by the statute of limitations so as to prevent the holders from participation in the distribution of the money ?

The decedent died in 1867, and letters of administration were issued to the widow and Jonathan G. Kittle, a creditor of the decedent. On January 12th, 1869, all the assets of the estate having been converted into money, a final accounting was had before the Surrogate, showing \$6,670 on hand, and on January 26th, 1869, a decree was duly made and entered by the Surrogate, directing the money to be distributed to the creditors, *pro rata*. Thirty-five different claims were established before the Surrogate (including one

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in favor of the administrator for \$43,000) amounting in the aggregate to \$49,000, and the dividend declared thereupon was eleven and one sixth per cent. on a dollar. This exhausted all the assets of the estate then in existence. But it appears that the decedent in his lifetime, along with many others, had filed with the United States government claims against England for a large amount, for increased or war premiums, which as a merchant he had had to pay out, to insure his freight and cargoes against risk of capture and destruction by the Alabama and other confederate cruisers.

These claims were denominated "indirect claims," and were, along with other claims known as the "direct claims," presented under a treaty between the United States and England, to the Court of Arbitration, provided for in the treaty, and that tribunal sustained the "direct claims," but threw out the "indirect claims," holding that they were not legitimate demands nor valid claims against England.

All the claims were presented by the United States as trustee for the different parties, and the United States government was in form the plaintiff, while England was defendant, and the court, while deciding against the "indirect claims," awarded to the United States government a gross sum in payment of the "direct claims." After receiving the award, the government created a Court called the Alabama Court of Claims and empowered it to distribute the money so recovered to the various holders of the "direct claims." This was done, and, after paying them all in full, a large unexpended balance was left over in the hands

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of the United States government, where it remained for some time. Finally, in 1882, Congress passed a law reorganizing the Alabama Court of Claims, and authorizing it to distribute the balance of the award unexpended to the various persons, who had been compelled to pay the large increased war premiums, for insurance. And by the award of that court, the sum of \$6,409.87 has come into the hands of the administrator, Kittle, which he holds for distribution.

The question now is, was this money assets of decedent's estate?

The claim of Cooley, when filed with the United States government, was undoubtedly an asset, unliquidated, dubious and uncertain, but still an asset. It was not a claim against the United States government, but a claim against England, and when Cooley filed it with the United States government, the government became his agent and trustee to prosecute and collect the demand. The United States as trustee presented the claim to the tribunal, provided for its settlement and adjustment, and it was thrown out and adjudged to be no claim, and from that time it ceased to be a claim, or an asset of any kind. Now did the Act of Congress of 1882, reorganizing the Alabama Court, and empowering it to award the unexpended balance to the various persons who had incurred the increased expense of war premiums for insurance, revive it as a claim and an asset of decedent's estate?

The money was not held by the United States government, to be applied to the payment of such claims, on the contrary they had been adjudged by the only tribunal having jurisdiction of the subject, to be no

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claim. It is of no consequence to whom this unexpended balance did belong, so long as it did not morally, legally or equitably belong to these "indirect claimants." The United States government took the responsibility of giving it to them, but because the money came through the Geneva Award, it did not make it any more applicable to the reimbursement of these persons who had been compelled to pay increased war premiums than the surplus or any other sum in the treasury. It is precisely the same as though the United States government had donated a sum of money to persons who had suffered by reason of the war, when no legal, equitable, or moral right existed in favor of the recipients.

It was simply a bounty, a *donum gratuitum* to those who perhaps had suffered during the war, but who had no claim, either legal, or equitable upon any body for indemnification. Now, should the bounty generously given by the government to these sufferers, be considered assets, and (before it ever reaches the object of the bounty or his family) liable to be appropriated in the payment of his debts?

This question is novel, but it is not without authority bearing upon the subject. The Superior Court of Baltimore city has in a recent case (*Ahrens v. Brooks*) held these "indirect claims" not to be assets, and that the money received on account of them did not belong to an Assignee in Bankruptcy. And the General Term in New York city, in another recent case, held that the money received on account of these "indirect claims" belonged to the bankrupt and not to his assignee in Bankruptcy; that it was not an asset, but a

bounty or gift to the bankrupt, and he alone was entitled to it. See *Taft v. Marsily* (47 *Hun*, 175).

The case of *Gillan v. Gillan* (55 *Pa.*, 430) seems to be on all fours with this case. There the decedent owned a house in Chambersburgh, Pennsylvania, upon which several claims or liens had been filed by different creditors, and an armed Confederate force came into the town, destroying the building along with a large number of others, belonging to different people. Subsequently the State made a donation or appropriation to indemnify the sufferers by that raid, and the proportionate share of the decedent having come into the hands of the administrator, the question was to whom did the money belong. An agreed case was made up, in which all the parties appeared and argued the question fully before the Supreme Court of Pennsylvania, in banc, and that tribunal held the money did not belong to the administrators or creditors, but belonged to the widow and children. The learned judge who gave the opinion, after declaring it to be a pure gratuity, said: "It would be a novel mode of rewarding personal merit or administering personal relief in such cases, to appropriate the bounty to the creditors of the party to be compensated or indemnified." I can see no difference in principle between that case and the case now before the court, and therefore hold that the funds in the hands of the administrator, Kittle, are not applicable to the payment of decedent's debts, but belong to the widow and children of decedent.

The fact that it was a bounty or donation determines the direction the fund must take.

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But, although I may be of the opinion that the funds belong to the decedent's wife and children, it does not follow that I can make a decree ordering the same to be paid over to them. If I am correct in holding the funds not to be assets of decedent's estate, then it follows that the administrator has received money belonging to the widow and children of decedent and is liable to them in an action for money had and received, a purely common law action of which a Surrogate's court has no jurisdiction. A decree directing the administrator to pay over money which he had in some way received, and which belonged to another, would be absolutely void, for in effect it would be determining private controversies between persons in their individual capacity. See *Bevan v. Cooper* (72 *N. Y.*, 317); *Tucker v. Tucker* (4 *Keyes*, 136); *Curtis v. Stilwell* (32 *Barb.*, 364).

A Surrogate's court is one of limited jurisdiction, having only what is given by the express terms of the statute, and some powers incidental thereto (*Sipperly v. Baucus*, 24 *N. Y.*, 46). In *Stilwell v. Carpenter* (59 *N. Y.*, 414), the Court of Appeals declared the general powers of a court of equity do not pertain to a Surrogate's court, and decided that that court could not set off mutual judgments.

That all parties are voluntarily before the court on a final accounting of an administrator, will not confer jurisdiction. If the court has no jurisdiction, even an agreement of the parties would not confer the power upon it. See *Tucker v. Tucker* (4 *Abb. Ct. App. Dec.*, 428). The widow and children must be left to such remedies against the administrator as the law affords them.

## BANTA V. WILLETS.

This disposition of the case makes it unnecessary to discuss the question of the application of the statute of limitations.

QUEENS COUNTY.—HON. A. N. WELLER, SURROGATE.—  
March, 1888.

## BANTA v. WILLETS.

*In the matter of the application for probate of a paper propounded as the will of BRIDGET HARROLD, deceased.*

The rule that undue influence, exerted to procure a testamentary disposition, must be sufficient to overcome free agency is limited to cases where the testator and his influential adviser stand upon a level, and does not apply where there is a confidential relation, and the latter occupies a dominating position.

The suspicion with which the law views a devise or bequest to a physician, a counsellor, or a guardian, from his patient, client or ward, is likewise indulged as between a master and a menial domestic servant.

While it is true, in every instance, that the influence alleged must be proved, the existence of such a relation, taken in connection with the fact of an unnatural disposition, shifts the *onus* to the shoulders of the one seeking to sustain the will.

*Marx v. McGlynn*, 88 N. Y., 370—compared.

The will of decedent, who had been a servant in her employer's family almost twenty-nine years, and was unable to read or write, was made more than fourteen years before her demise, and disposed of her little all, consisting of her claim for unpaid wages for nearly the entire period, in somewhat elaborate provisions, in favor of her mistress, W., and descendants, to the exclusion of her own niece, her only next of kin, to whom she had ever been devotedly attached, and had stated that she intended to leave her property.

There was evidence on the part of proponent, to show that decedent, at the time of execution, was confined to her bed by illness, and expressed a desire to make a will, stating her wish to leave her money where she



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had earned it; that proponent protested against such a disposition, but, at length yielding, procured the attendance of witnesses and a scrivener, and assisted decedent from her couch to the dining-room, where the document was drawn and subscribed. It was then taken by proponent and placed in her strong box, where it remained until she produced it for probate.—

*Held*, that the efficiency of proponent's family, in respect of the genesis, and solicitude for the preservation, of the will were too great to warrant the court in ignoring the presumption which the law raised against its validity; and that probate must be refused.

APPLICATION for probate of will. The facts are stated in the opinion.

THE SURROGATE.—This case is an extraordinary one. A servant girl's will is offered for probate by her employers' family. The will is contested by Mary Banta, decedent's niece and her only next of kin and heir at law.

The decedent was a servant of Isaac W. Willets, of North Hempstead, and had been in his service, as a domestic, for nearly twenty-nine years. She came from Ireland about thirty-three years ago, and for the first three years found a home with her sister, a Mrs. Pendergast, the mother of contestant, Mary Banta; and while she was making her home at her sister's the contestant was born. Decedent nursed and cared for contestant during her early infancy, the mother being sick most of the time. Decedent and contestant were much attached to each other, and a correspondence was kept up between them down to the day of decedent's death. Contestant visited decedent occasionally, and occasionally decedent visited contestant; and their attachments were never interrupted but continued unbroken to the end. Dece-

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dent before making the alleged will, and afterwards, frequently said to different people that contestant should have all she had when she died.

The decedent died November 13th, 1887, at the house of her master, Mr. Willets; and after her death a will was produced by the mistress of decedent, made more than fourteen years before her death. By this will, decedent bequeathed to Emma Willets, a daughter of her master \$100, and to Alice W. Titus and Charles W. Sherwood, grandchildren, \$50, each, directing the principal to be invested, and the accumulations added to the principal until they arrived at twenty-one years of age, with a limitation over to their respective mothers, should they die before maturity. All the rest and residue she gave to the wife and son of her master, and appointed her master and Oliver Titus, a cousin of Mrs. Willets, executors.

The origin of this will is not very clearly shown. Mrs. Willets, one of the chief beneficiaries, says that deceased was taken sick with an intermittent fever, and expressed a desire to make a will, saying she had earned her money there, and she wanted to leave it with the family. Mrs. Willets says she protested, but communicated Bridget's desire to her husband, Mr. Willets, who went to Roslyn and got a Mr. Hicks to come up and draw the will. Mr. Hicks was a friend of the family but not a lawyer. Mrs. Willets also states that, when Mr. Hicks, the writer of the will arrived, she went upstairs to decedent's room, got her up out of a sick bed, and assisted her down stairs into the dining room, where the will was drawn and executed, she being in and out of the room during the time.

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Mr. Hicks, the writer of the will, witnessed it, signing the name of the decedent for her, she not being able to read or write. The other witness was Mr. Gibson, a neighbor, since deceased. How he came to act as a witness does not distinctly appear. Mrs. Willets says she thinks her husband went for him, but she did not hear decedent request any one to go for him. After the will was executed, Mrs. Willets, one of the chief beneficiaries immediately took possession of the instrument, put it in her strong box, and has kept it ever since, the decedent never seeing it again, and never asking to see it.

The decedent came into the employ of the Willets family as a common domestic, and continued in that menial capacity down to the day of her death. Her wages were five dollars per month in winter, and six dollars in summer. She did not take up her wages as they became due, only occasionally receiving small sums as needed from time to time, and all the estate, left by decedent at her death, was the amount due her as a servant to this family, who were her sole beneficiaries. No settlement had taken place between decedent and her employers, and no one on the hearing seemed able to tell how much was due her. At the time the alleged will was drawn, fourteen years before her death, decedent asked Mrs. Willets how much was coming to her, and she was told that she had not figured it up, and could not tell exactly, but she supposed it was about five or six hundred dollars. The decedent was weak, simple minded, ignorant and taciturn, having no acquaintances and receiving no

visitors, with the exception of her niece, Mary Banta, and her brother-in-law Mr. Pendergast.

A will made by a servant bequeathing to her master's family all she has in the world, which consists merely of the wages due from her master, challenges suspicion, and when reinforced by the fact that the will is at variance, with decedent's expressed intention, both before and after the date of the will, and is likewise opposed to the dictates of nature and justice, the presumption is that it was the result of undue influence. It is true undue influence must be proved and not presumed, and ordinarily it will not be presumed from a motive nor opportunity to exercise it. But where a weak, simple-minded servant girl, makes a will in favor of those who, for a quarter of a century, have dominated over her, and whose slightest commands she had been accustomed implicitly to obey, it shows such a subordinate confidential relation as will peculiarly imply the exercise of undue influence and authority over her, and the *onus* is changed at once; all suspicions must be allayed, and it must appear, by clear and convincing evidence, that the will is the free, full and unbiassed act of decedent's own mind.

Undue influence may be exercised by physical coercion or by threats of personal harm and duress, by which a person is compelled really against his will, to make a testamentary disposition of his property. That kind of undue influence can never be presumed. It must be shown by evidence legitimately proving the facts. But there is another kind of undue influence more common than that just referred to, and that is, when the mind and will have been overpowered

by the commanding position of another, so that the testator willingly and intelligently executed a will, yet, it was really the will of another, induced by the overpowering influence exercised upon a weak or impaired mind. Judge EARL, in *Marx v. McGlynn* (88 *N. Y.*, 370), says: "There are certain cases in which the law indulges in the presumption that undue influence has been used, and these cases are: where a patient makes a will in favor of his physician; a client in favor of his lawyer; a ward in favor of his guardian; or when other close confidential relationship exists. Such wills, when made to the exclusion of the natural objects of the testator's bounty, are viewed with great suspicion by the law, and strong proof should be required, besides the *factum* of the will, before the will can be sustained." This rule relative to lawyers, physicians and guardians applies with equal, if not greater, force to that of master and servant. Surely, if the law presumes undue influence where physicians or lawyers are made beneficiaries, it ought to indulge in the same presumption against a master, who has long dominated over a simple-minded menial.

The rule, that undue influence must be sufficient to overcome free agency, is limited to cases where the testator and legatee stand on a level. It does not apply where there was a confidential relation, the testator being dependent, and the beneficiary holding the dominating situation (*Redf. Lead. Cas. on Wills*, 522, *n.*; *Tyler v. Gardiner*, 35 *N. Y.*, 559; *Kevill v. Kevill*, 6 *Am. L. Reg., N. S.*, 79; *Taylor v. Wilburn*, 20 *Mo.*, 306; *Marshall v. Flinn*, 4 *Jones [N. C.] Law*,

199; Swinburne on Wills, 887; Matter of Smith, 95 N. Y., 516; 1 Redf. on Wills, 515).

The learned counsel for the proponent, in his very able brief, says "there is no affirmative proof that the proponent or any other person, exercised any undue influence whatever upon the deceased." The answer to the suggestion is that, because of her menial, dependent position, and the dominating sway over her by the beneficiaries under the will, the law will presume undue influence, and the proponents of a will in such a case are bound, on applying for probate, to give some explanation of its unnatural character, and to disprove the legal presumption that it was the result of undue influence arising from the peculiar relations of the parties (*Colhoun v. Jones*, 2 Redf., 34, 37, 38; 4 *id.*, 409; *Estate of Sarah A. Peck*, 27 W. D., 157; *Will of Demmert*, 3 *Law Bull.*, 39). In the language of Surrogate ROLLINS (*Case of Peck*, *supra*): "Fraud and undue influence will readily be inferred in such a case, unless all jealous suspicions are put to rest by satisfactory testimony." Who, outside of this family, ever heard Bridget say she intended to give all she had to them, or that she ever expressed any peculiar regard or affection for them? Several witnesses swore that she stated that she intended her niece Mary Banta should have her property, but none that she intended her master's family should be her beneficiaries. Again, why should this feeble minded domestic think of making a will at all? Persons of her humble walk in life are not given to making wills. Who put the idea into decedent's head?

But the contents of the will most emphatically

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stamp it as the will of another. She gave \$50 to each of two of her master's grandchildren, with instructions that the legacies be invested, and the accumulations added to the principal, until the children arrive at the age of twenty-one years, and, in case of their death before that period, a limitation over to their respective mothers. This is too comprehensive a testamentary scheme, to be the product of the brain of a poor domestic drudge, and was never evolved out of her feeble mind unaided by some dominating influence outside of it. But again, why should decedent utterly ignore her niece Mary Banta, the only relative she had in the world? She was a sister's child, born almost in her arms. Naturally Mary Banta would seem like her own offspring, and the proof shows that she was much attached to her; that it continued to the end, and that decedent on two or three different occasions said to different people that Mary should have what she possessed when she died. What explanation is there of the disregard of such natural affections, manifested by this will? Why such a radical change from her previously as well as subsequently expressed testamentary intentions? The suspicions of undue influence excited by the dependent and dominating relations existing between the testator and her beneficiaries, and the sudden change of her testamentary intentions have not been removed, but, on the contrary, strengthened by the testimony relative to the manner of the execution of the will. Mrs. Willets told her husband to go after a man to draw the will. True, she says the deceased requested it, but the fact remains that Mrs. Willets was the

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prime moving spirit in bringing the will into being. She got the deceased up out of a sick bed and helped her down stairs to make the will. When the scribe arrived and as soon as it was executed, she takes possession of the will, and keeps it under lock and key until after decedent's death. The family had altogether too much to do with the making of the will, and have manifested too much interest in its preservation, to warrant me in ignoring the presumption which the law raises against it.

I, therefore, decline to admit the paper to probate.

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ALBANY COUNTY.—HON. FRANCIS H. WOODS,  
SURROGATE.—February, 1888.

## MATTER OF VEDDER.

*In the matter of the probate of the will of ELIZA ANN  
VEDDER, deceased.*

The doctrine of *Delafield v. Parish* (25 N. Y., 9) upon the subject of testamentary capacity—explained as deciding that every man is presumed to be *compos mentis*, and the burden of proof rests upon the party alleging an unnatural condition of mind to have existed in the testator. The policy of the law embodied in Code Civ. Pro., § 829, whereby, in a probate proceeding, the husband of testatrix, being proponent of the will, was rendered incompetent to testify concerning communications with decedent, upon an issue as to testamentary capacity—declared a hoary superstition.

Where an insane delusion is proved, the testator's mental capacity is to be measured by the relations of the delusion to the testamentary act.

Upon an application for the admission to probate of the will of decedent, a married woman, executed about two and a half years before her



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death, which occurred at the advanced age of seventy-seven years, it was shown that her physical powers had been gradually failing; that she was miserly in disposition, and, at times, uncleanly in her habits; that, during the last quarter of a century, she had been a believer in witchcraft, frequently talked of buried treasures, had seen the headless horseman, gave absurd recipes and advice to others; pretended to have had personal interviews with the deity and the evil one, to have entered heaven and conversed with its inhabitants; and expressed a desire to be robed like the angels when she died:—While, on the other hand, it appeared that she was prudent and sensible in the management of her household affairs, shrewd at a bargain, a consistent church member, interested in religious work, and an affectionate wife; that the dispositions of her will were in accord with natural claims upon her bounty, and that, as the subscribing witnesses testified, she was rational at the time of execution.—

*Held*, that the petition for probate should be granted.

*Van Guysling v. Van Kuren*, 35 *N. Y.*, 70—compared; *Morse v. Scott*, 4 *Dem.*, 507—distinguished.

APPLICATION for probate of will. The facts are stated in the opinion.

JOHN T. McDONOUGH, *for proponent*; EDWIN COUNTRYMAN, *of counsel*.

H. T. SANFORD, *for contestant*; EUGENE BURLINGAME, *of counsel*.

THE SURROGATE.—This is a proceeding for the probate of a paper purporting to be the last will of Eliza Ann Vedder. By this instrument, all the property of decedent is devised and bequeathed to her husband, the proponent here, except a legacy of \$100, given to Eliza Sicker, her niece and namesake. The nephews and nieces of decedent oppose the probate on the grounds that the will offered was not the free, voluntary and unconstrained act of Mrs. Vedder, that it was not subscribed, published and attested by her as required by law, and that she was not of sound mind, memory and understanding.

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The testatrix died January 19th, 1887, at the town of Watervliet, aged about seventy-seven years. Her married life covered a period of twenty-seven years, during which she and her husband lived contentedly on the farm of eighty acres which they owned in common. There was no issue of the marriage. The proponent is about fifty-seven years old. The will in question was executed in August, 1883, at their house. At the same time and place, Mr. Vedder, the proponent, made and executed a will, whereby he gave all his property to his wife, the testatrix here. Both wills were drawn by the same draftsman, who was not a lawyer, but a neighbor and friend of this aged couple. The same subscribing witnesses attested each of these wills.

I am satisfied from the evidence, beyond a doubt, that the will in question was executed, published and attested according to law, and that it was the free and unconstrained act of Eliza Ann Vedder. Undue influence is not shown to have been exercised. The value of the property of each was about equal, and the disparity in ages was not so great as to seriously disturb the proportion of interests. The influence which the law condemns is that which is exercised by coercion, fraud and imposition, and not such as arises from gratitude, affection or esteem. Undue influence must amount to the moral coercion, which restrains independent action, and destroys free will and agency, and the burden of proof is on the party alleging it (*Matter of Martin*, 98 *N. Y.*, 193). The most serious question I have had to consider is that of the testamentary capacity of this testatrix. The testimony

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bearing thereon is very voluminous, covering five hundred type-written pages. Among the principal facts proved by the contestants, are the following: That the testatrix was very old and in a gradually failing physical condition; that she frequently talked to her neighbors about buried treasure, and how to find it; that she put irons in the cream, and marked the bottom of the churn with the sign of the cross, to make the butter come; that she said she could not keep her horses fat because the witches rode them at night; that she was close-fisted and miserly in her disposition and, at times, uncleanly in her way of eating and slovenly in her apparel; that she refused to buy necessary under-clothing for a sick sister; that she said she had conversed with Jesus, and had seen the evil one; that she believed in witches and witchcraft, that she told a neighbor, that she had seen a headless horseman riding across her field; that she told another neighbor that her crying child was bewitched, and that if she would search its pillow she would find a hard bunch of feathers therein, which was the witch, and that she should boil this bunch at night in a pot, and that at midnight she would hear some one knock,—that she should not answer, and in the morning the body of the witch would be found outside the door; that she said she had seen lights over certain spots on the farm, and, that, if a person would dig there at midnight, he would find money there; that she told a certain woman to put live coals and a red garter under her churn, and that the butter would come; that she had talked with a fortune-teller, who told her of the buried money; that she

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once said, at Schenectady, that she had seen the Lord Jesus, with a sword, and the angels about him; that she said she had seen a ball of light in the air, with the reflection of soldiers marching, and that the heavens became red as blood when the lights disappeared; that, once upon a time, she took her nephew (a contestant) to dig for gold on her farm, and had him carry a red rooster under his arm for good luck (as I suppose), and that they dug, and got no gold; that she said it was wicked for her to mourn for her deceased sister, because she had seen her in a vision and been told by her not to mourn; that she said she had been to heaven in visions and conversed with people there; that she said she desired to be robed like the angels when she died; that all these strange things were said and done by her during the last quarter of a century of her life: and the witnesses who testify of these things believe she was irrational because of them, although some of them say that in her ordinary affairs she was not a foolish woman.

On the other hand, the proponent proved that, in the performance of her household duties and farm business, the testatrix was a prudent, sensible woman; that, since her marriage, she had successfully looked after the financial affairs of herself, and to some extent those of her husband; that she kept her house neat and clean; that, within a few years before her death, she was a party to an agreement to let the farm on shares, and that she gave wise directions as to how it should be worked; that she went to market frequently, and made good sales of her farm products, and made sharp bargains for necessary supplies; that

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she was a life-long member of the Reformed Dutch Church in her neighborhood, and attended services regularly until the last two or three years of her life, when she was disabled by rheumatism and other bodily infirmity; that she labored to bring her husband into membership; that she was greatly interested in church work; that she frequently read her Bible and prayed with her pastor; that her married life was happy and peaceful, and that respectful and affectionate relations existed between her husband and herself; that a belief in visions was a part of her religious faith; that she believed she had sent several persons to heaven by converting them; that she held Christ as her Saviour, and believed in a real communion with him through prayer; that she had an intense way of expressing her religious experience; that many of her expressions were borrowed from the Bible; that she accepted the sacred scriptures as the inspired word of God; that she believed in their inspiration as declared in the creed of the Reformed Dutch Church: and the witnesses who testify to these things believe her to have been rational. The subscribing witnesses are clear and emphatic in their belief and opinion, that the testatrix was of sound mind and memory when she executed the will.

By force of a hoary superstition of the law, embodied in the statutes, the husband and next of kin, who knew her best, were not permitted to testify, as to the personal transactions or communications with her. It does not appear that there was any unfriendly feeling between testatrix and her contesting kinsfolk.

There is no evidence whatever to show that any or

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all of these beliefs, delusions, eccentricities or peculiarities, had the slightest connection with or influence upon her testamentary act here in question. There was one medical witness sworn on each side, who had never personally known or seen the testatrix, and who answered hypothetical questions made up from the testimony. Of course the medical testimony is quite evenly balanced, and has no decisive weight either way (*Ferguson v. Hubbell*, 97 *N. Y.*, 513, 514).

The statutes declare that all persons except idiots, persons of unsound mind and infants, may devise real estate, and that persons of a certain age, of sound mind and memory, may bequeath personal property. The courts have held that, under these provisions of law, all that is required is, that, at the time of making a will, the testator shall have sufficient capacity to comprehend the condition of his property, and his relations to the persons who are or might have been the objects of his bounty, and the scope and bearing of the provisions of his will (*Van Guysling v. Van Kuren*, 35 *N. Y.*, 70). There is no presumption against a will, because made by a person of advanced age, nor can incapacity be inferred from an enfeebled condition of mind or body (*Horn v. Pullman*, 72 *N. Y.*, 269-276). The criterion as to mental capacity, in all who are not idiots or lunatics, rests on the determination whether the testating party was *compos mentis*, or *non compos mentis*, as those terms are used in their fixed legal meaning. The person propounding a will must prove the mental capacity of the testator, but at common-law, and under our statutes, as defined by the highest authority, the legal presump-

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tion is that every man is *compos mentis*, and the burden of proof that he is not so rests upon the party who alleges that an unnatural condition of mind existed in the testator (*Delafield v. Parish*, 25 *N. Y.*, 9).

The doctrine, that *any* insane delusion incapacitates from making a will, is not followed in this State. The rule here seems to be well settled, that mental capacity is to be measured by its relations to the testamentary act. It has, therefore, been held that a person having any insane delusion relating to the property, the persons concerned, or the provisions of the will, is incapable; while delusions which in no way relate to these do not, as a matter of law, incapacitate, for they involve no more likelihood of actual incapacity than many other latent causes. Thus, in *Van Guysling v. Van Kuren* (35 *N. Y.*, 70), the facts in many respects resembled those proved in the case at bar. There, it appeared that the testatrix believed she was tormented by witches and spooks, which kept her awake at nights, and became enraged at those who told her there were no witches; that she imagined she saw things which did not exist; that she described visions she had while sleeping; that she talked disconnectedly and was forgetful; that, on one occasion, she directed a person to buy two pounds of pork, and gave him only two cents to buy it with, when the price was eight cents; that she used her fingers instead of a knife and fork; that her eyes were frequently wild and glaring, and yet the Court of Appeals held she was of disposing mind and memory.

In *Thompson v. Quimby* (2 *Bradf.*, 449; 21 *Barb.*, 107), the testator believed that he had found the place

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where Captain Kidd's treasure was buried, and he was only prevented from getting it by broken spells; that he had been hugged by a ghost; his housekeeper having dreamed that his pair of horses, which cost \$250, would run away and kill him, he exchanged them the next day for a horse not worth ten dollars; that he had the recipe to make the philosopher's stone; that there were spirits in the air; that spirits tormented him in sickness, and that he had seen the evil one in the shape of a bull. The learned Surrogate BRADFORD reached the conclusion that the credulity, superstition and absurd belief in the supernatural are not, *per se*, indications of insanity, and he probated the will. The General Term confirmed his decision, and held that "erroneous, foolish and even absurd opinions on certain subjects do not show insanity, when the person entertaining them still continues in the possession of his faculties, discreetly conducting not only his own affairs, but the business of others." In Forman's will (54 *Barb.*, 274, 297), it was said that a monomaniac or a partially insane person may make a will. A believer in witches and witchcraft, in spiritualism, or in the doctrines of Mahomet, may make a will. In Bonard's case (16 *Abb.*, *N. S.*, 128, 182), the deceased was a believer in the doctrine of metempsychosis, and gave his entire estate of \$50,000 to the Society for the Prevention of Cruelty to Animals, and his will was sustained.

In *Coit v. Patchen* (77 *N. Y.*, 533), the will was contested, and delusions alleged as to the conduct and affection of testatrix's husband, and as to the want of affection for her on the part of some of her children;



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among others, that they desired to confine her in an asylum, whereby she was led to discriminate against them. The testatrix was a strong-minded woman. She had had a severe sickness some years before making her will; she continued thereafter, however, to manage and control her business, to collect her rents and make improvements. She conversed intelligently. No act of insanity or improvidence as to her business affairs was shown. She was passionately jealous of her husband, and quarreled with him frequently. The children discriminated against sided with the husband, and those favored sided with the mother. Lunacy proceedings were instituted and then stopped by the husband. It was held, that the evidence failed to show any insane delusions, such as rendered testatrix incompetent to make a will. In *Children's Aid Society v. Loveridge* (70 *N. Y.*, 387), it was held that the fact that an aged person is forgetful, and at times labors under slight delusions, does not, *per se*, establish testamentary incapacity.

The learned counsel for proponent have called my attention to many cases in other States, holding substantially the doctrine laid down in the foregoing cases. Thus, in *Addington v. Wilson* (5 *Ind.*, 137), the testator believed in witches, and that his wife and daughters were bewitched. In *Kelly v. Miller* (39 *Miss.*, 17), the testator believed in witches and conjurors; that his mother was bewitched; that his horse and gun were bewitched; and that when he broke bread at table it turned into blood. In *Lee v. Lee* (4 *McCord* [*S. C.*], 183), the testator believed that all women were bewitched, and he could not sleep on

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a bed made by a woman. In *Robinson v. Adams* (62 *Maine*, 369), the testatrix was a spiritualist who believed that her son-in-law was under the control of an evil spirit; she kept books of spiritual communications which she considered of great value, and declared that the spirit of her deceased husband directed the terms of the will. In *Brown v. Ward* (53 *Maryland*, 377), the testatrix was a spiritualist who was of belief that she communed with spirits, could cure the sick, and foretell future events. In *Smith's will* (52 *Wis.*, 543), the testator was a spiritualist, and claimed to have received a message from his deceased wife, telling him to marry the appellant, beneficiary, and he frequently consulted mediums about his business and proposed investments. In all these cases, the wills were sustained by the highest tribunals.

The learned counsel for contestant strongly urge, among many others, the case of *Morse v. Scott* (4 *Dem.*, 507), and *Benedict v. Cooper* (3 *Dem.*, 362), as favoring their contention. The latter was not for a probate, but to revoke a probate, and has little, if any, bearing on the question involved here. The former case, however, does bear on the question. The testator was an ignorant man, weak and superstitious; he had delusions on various subjects; he built a vault and purchased a metallic coffin, which he said would preserve his body to all time; he gave public notice that he would die on a certain day, and two hundred people gathered about the house to witness the event; he was boisterous, profane and often indecent in his language; he erected tombstones over two buried horses, and bought coffins for his dog and cat;

## MATTER OF VEDDER.

he made a number of wills, in all of which some provision was made for perpetually maintaining his vault. By the will offered for probate, he disinherited his next of kin, and gave his property to a Church-Society, not to advance the cause of religion, but, as he said, for the purpose of having his vault preserved to the end of time; and he declined to make his relatives trustees because they could not live to the end of time to care for his body, which was to be preserved forever. The learned Surrogate held that the will was the *result* of an insane delusion, which controlled his judgment and misled his understanding in relation to the subject upon which it was acting, and was therefore invalid. This case differs from almost all of the cases above cited in courts of this State, in that, while in those cases the delusions did not enter into or affect the will, and did not influence the mind in making the disposition of the property, in this case the will was the very outgrowth of the delusion.

There is no evidence as to this will of Eliza Ann Vedder, to bring it within the doctrine laid down in *Morse v. Scott*, or in *Seaman's Friend Society v. Hopper* (33 *N. Y.*, 619), or the very recent case of *Keeler* (12 *N. Y. State Rep.*, 148), all of which were decided upon the ground that the delusion affected the testamentary act. Mrs. Vedder's will comes within the decision made in *Van Guysling v. Van Kuren* (*supra*). It was not, under the circumstances, an unnatural or improper will for her to make. For a quarter of a century she and her husband, the beneficiary, lived happily together, owning and holding their property as tenants in common. They had no children. Evi-

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MATTER OF VEDDER.

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dently, they determined that whichever survived would take the whole property; so they made mutual wills. The testatrix had the right to dispose of her property as she saw fit. She was under no obligation to provide for nephews or nieces. Her will is entirely unconnected with and uninfluenced by the delusions with which she was affected. It is not the result of any particular delusion or any combination of delusions nor does it appear that she was influenced in making it by the peculiar views she held. In fine, there is nothing in the case which shows that she had any delusions in regard to her nephews, nieces, her property, or the disposition thereof. As we have seen, a belief in spiritualism, paganism, or demonism does not necessarily disqualify one from disposing of property by will.

As to the belief in witchcraft, the learned counsel for proponent, Judge COUNTRYMAN, has enriched his brief with rare and curious learning, and in the light derived from it, and from the entire testimony, we may more perfectly understand the mental condition of this quaint old lady, Mrs. Vedder, who, sensible and prudent in her daily walks and conversation, and performing her duties and filling her station with at least the fairly average intelligence of people of her condition, yet had many of the strange beliefs and superstitions which were prevalent two or three centuries ago, and which are largely overthrown and discarded in our day. Scarcely two centuries ago, the great body of Christians believed in witchcraft, and, under the solemn sanction of the law, hundreds of poor old ladies, condemned as witches, were tortured and died

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amidst the blazing faggots. It is said that, during the Long Parliament, hundreds were even thus put to death in England. The lurid light of these judicial fires is spread on the pages of American history. Commanding intellects—Coke, the mighty Bacon, wise Sir Matthew Hale, Martin Luther, John Wesley, Cotton Mather, believed in witchcraft.

Profound theologians contended that a disbelief in it was rank heresy, and they cited Scripture to their purpose: "Thou shalt not suffer a witch to live" (Exodus, xxii., 18). "A man or a woman that hath a familiar spirit, or that is a wizard shall surely be put to death" (Leviticus, xx., 27). "Saul, during his reign put away those that had familiar spirits and the wizard out of the land" (Sam., xxviii., 9). St. Paul says, witchcraft, like idolatry and heresy, adultery and drunkenness, is a work of the flesh, and no one who practices it shall inherit the kingdom of God (Ep. Galat., v. 19, 21). When the prophets failed to answer Saul what he should do, he inquired of the witch who lived at Endor . . . . She said she brought up Samuel from the grave to answer the King (1 Sam., xxviii., 15). Manasseh, the son of Hezekiah, "did that which is evil in the sight of the Lord, for he used enchantments, and used witchcraft, and dealt with familiar spirits and with wizards" (2 Kings, xxi., 6).

The Bible was the book of books to the aged testatrix. Its lessons had sunk deep in her heart, its language was often on her lips, it was to her the precious fountain of God's inspiration. It is not passing strange, that the ancient belief in witchcraft survived in her, and found expression and action as has been recorded.

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MATTER OF DOCKSTADER.

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I am persuaded that her beliefs, peculiar and strange in many respects, in the clearer light of to-day, did not disqualify her from disposing of her property by will, and I accordingly hold that she was *compos mentis*, and that the paper propounded as her will should be admitted to probate.

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MONTGOMERY COUNTY.—HON. H. V. BORST, SURROGATE.—February, 1888.

## MATTER OF DOCKSTADER.

*In the matter of the probate of the will of MARY DOCKSTADER, deceased.*

An alleged will, subscribed by decedent by making a cross-mark, and one of the two subscribing witnesses whereto is dead, may, where other essential circumstances appear, be admitted to probate upon the testimony of the living witness that he saw decedent make the mark, and proof of the handwriting of the other,—this being a compliance with Code Civ. Pro., § 2620, which requires “proof of the *handwriting* of the testator,” where “a subscribing witness whose testimony is required is dead.”

Matter of Reynolds, 4 Dem., 68—distinguished.

APPLICATION for probate of will. The facts are stated in the opinion.

R. B. FISH, for proponent.

THE SURROGATE.—It has been objected that the proof of the handwriting of the testatrix in this

## MATTER OF DOCKSTADER.

matter is not sufficient, and that the application for probate should be denied.

The execution of the paper purporting to be the will of Mary Dockstader was proved by one of the subscribing witnesses, and it appearing that the only other subscribing witness was dead, his handwriting was duly proven. The testatrix's name was written by the living witness, and she subscribed her name by making a cross-mark. It is provided by § 2620 of the Code that "if a subscribing witness, whose testimony is required, is dead, . . . . the will may nevertheless be established, upon proof of the handwriting of the testator, and of the subscribing witness and also of such other circumstances as would be sufficient to prove the will upon the trial of an action." There is nothing in the section that requires such proof of the handwriting to be made by more than one witness.

The handwriting of the testatrix was proved by the living subscribing witness. He testifies that he was present and saw her make her mark at the end of the proposed will. No better proof of her handwriting than this can be given, and it is sufficient. With the due proof of the handwriting of the subscribing witness, all the requirements of the statute have been answered, to entitle the will to be admitted to probate.

My attention has been called to the Matter of Reynolds (4 *Dem.*, 68). In that case, it does not appear that the living witness saw the testator make his mark, and hence no one could give "proof of the handwriting of the testator," for, as the learned Sur-

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rogate in that case says, "a cross-mark has no such cast or form as to distinguish it from a like mark made by any other individual." That will may not have been subscribed by the testator in the presence of each of the attesting witnesses, but he may have acknowledged it to have been by him subscribed to each of such witnesses. That would have answered the requirements of the statute, and the necessary proof could have been given by the witnesses, if living. But, the one witness being dead, proof of the handwriting of the testator must be given, and, the living witness not seeing the testator make his mark, there was no one in that case to testify to his handwriting. That case does not conflict with the conclusion reached in the case under consideration.

A decree will be entered, admitting the will to probate.

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DELAWARE COUNTY.—HON. DANIEL T. ARBUCKLE,  
SURROGATE.—January, 1888.

SIMPSON v. FRENCH.

*In the matter of the judicial settlement of the account  
of FRANCES A. FRENCH, as executrix of the will  
of PHEBE HITCHCOCK, deceased.*

A contingent remainder or future estate is authorized by the Revised Statutes, and is valid even although, by the terms of its creation, the first taker is permitted to dispose of the whole, during his lifetime, for



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purposes other than his maintenance, and thus by his volition defeat the expectant estate.

The will of testatrix devised to her husband, J., all her real property, "to do with as he shall think best"; bequeathed to him all her personal property, without any terms of restriction, declaring that she wished her "said husband to do with said property as he shall think best during his lifetime, without any let or hindrance from any source whatever"; gave to a daughter, F., \$8,000, to be paid out of her real and personal estate, at and after J.'s death, "provided there be that amount" in J.'s hands at his decease; and finally repeated that J. might use so much of her real and personal estate as he might wish, during his lifetime, and that, at his death, if \$8,000 remained in his hands, that amount should be paid to F., or if the residuum proved to be less, that F. then have whatever so remained, "to do with as she shall think best."

J. died shortly after his wife, never having taken possession of, or used any of the property, so devised and bequeathed to him, and leaving a will whereby he gave his entire estate in equal shares, to F. and another daughter.—*Held*,

1. That the intention of testatrix was to give to J. a right to use her estate, not merely for his maintenance, but at pleasure, even to its utter exhaustion, during his lifetime, but no power to dispose thereof by will.
2. That her will, accordingly, created a contingent remainder, in favor of F., which was valid under 1 R. S., 725, §§ 32, 33, and *id.*, 773, § 2; and, the defeating contingency having been rendered impossible by the death of the first taker, the remainderman had the right of immediate possession.

*Greyston v. Clark*, 41 *Hun*, 125—followed.

CONSTRUCTION of will, upon judicial settlement of account of executrix thereof. The facts are stated in the opinion.

*HALLOCK, JENNINGS & CHASE, for F. A. French, as executrix and individually.*

*H. D. NELSON, and E. D. WAGNER, for Augusta H. Simpson, individually, and as executrix of the will of John Hitchcock, deceased.*

THE SURROGATE.—Phebe Hitchcock died at Davenport, in this county, on March 31st, 1886, leaving a last will and testament containing the following provisions, viz. :

"*First.* I give, devise and bequeath unto my husband, John Hitchcock, all of my real estate situate in said town of Davenport to do with as he shall think best.

"*Second.* I give, devise and bequeath unto my said husband all and every kind of my personal property, consisting in part of mortgages, bonds, notes and money, etc., and wish my said husband to do with said property as he shall think best during his lifetime without any let or hindrance from any source whatever.

"*Third.* I give, devise and bequeath to my daughter, Mrs. F. A. Churchill, the sum of eight thousand dollars to be paid her out of my real and personal estate at and after the death of my said husband, provided there be that amount in my husband's hands at his decease.

"*Fourth.* I wish it to be distinctly understood that my said husband may use so much of my real and personal estate as he may wish to, during his lifetime, and at his death if there be the sum of eight thousand dollars remaining in his hands, that that amount be paid to my daughter Mrs. F. A. Churchill, and if there be not the sum of \$8,000 in his hands then and in that case it is my wish that my said daughter have and receive whatever then remains in my said husband's hands, to do with as she shall think best.

"*Fifth.* I do hereby nominate and appoint and constitute my husband, John Hitchcock, my executor, and my daughter Mrs. F. A. Churchill, now of the city of New York, my executrix of this my last will and testament."

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This will was admitted to probate July 26th, 1886, and on that day letters testamentary were issued to Frances A. Churchill, now Frances A. French, the surviving executrix.

John Hitchcock, the husband of Phebe Hitchcock, died June 16th, 1886, leaving a last will and testament which, after giving certain specific legacies bequeathed and devised the remainder of his property equally to his two daughters, Frances A. French and Augusta H. Simpson. This will was admitted to probate July 27th, 1886, and letters testamentary were issued thereon to Frances A. French and Augusta H. Simpson, August 3d, 1886. None of the property left by Phebe Hitchcock was ever taken possession of by John Hitchcock under her will, and no portion of it was ever used by him or for his benefit.

Upon this accounting, it becomes necessary, and is the duty of the Surrogate, to construe the will of Phebe Hitchcock, so far as to determine whether the legacy mentioned in the "Third" provision thereof, belonged to John Hitchcock absolutely, and at his decease became a portion of his estate, or did he take therein only an estate for life, with power to use or dispose of the whole, but, if such power was not exercised, the balance remaining to belong to the legatee, Frances A. French (Code Civ. Pro., §§ 2472, 2481, 2743; *Matter of Verplanck*, 91 *N. Y.*, 439; *Riggs v. Cragg*, 89 *N. Y.*, 479).

It is an unquestioned rule, that, in construing wills, the intention of the testator must govern, unless it violates some statute or well-settled rule of law, and this intention must be ascertained from the whole

instrument. No technical form of words is necessary to give effect to it, and when there exists a provision seemingly repugnant to other portions, such repugnant provision must, if possible be reconciled with the other provisions, so that no interest intended to be given will be sacrificed (*Roseboom v. Roseboom*, 81 *N. Y.*, 356; *Campbell v. Beaumont*, 91 *N. Y.*, 465; *Taggart v. Murray*, 53 *N. Y.*, 233; *Van Vechten v. Keator*, 63 *N. Y.*, 52).

The "First" provision of the will of Phebe Hitchcock relates to her real estate, which is not in question upon this accounting. The first part of the "Second" provision gives her husband all her personal property absolutely, and then adds: "And wish my said husband to do with said property as he shall think best during his life, without any let or hinderance from any source whatever." By the "Third" provision, she bequeaths to her daughter, Mrs. F. A. French, eight thousand dollars, to be paid out of her real and personal estate at and after the death of her husband, provided there be that amount remaining. By the "Fourth" provision, the testatrix defines and endeavors to make plain what her intention was, as expressed in these preceding provisions, and says in substance that she intends her husband shall be at liberty to use so much of her real and personal estate as he may wish to, during his lifetime, but if at his death any portion remains unexpended, then, to the amount of eight thousand dollars, that portion must belong to her daughter, Mrs. French, "to do with as she shall think best."

From all these provisions read together, there can

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be but one interpretation as to the intention of the testatrix, viz.: That she intended to make full and ample provision for the maintenance, support and comfort of her surviving husband during his life, even to the extent of her entire property, but if any portion of her estate then remained, she desired eight thousand dollars of such portion to belong to her daughter, Mrs. French. Unless this plain intention of the testatrix violates some statute or well-settled rule of law, such must be the disposition of this case. It is unnecessary to consider the cases referred to by counsel, decided under the common-law, and before the enactment of the Revised Statutes.

In *Roseboom v. Roseboom* (*supra*), the will provided: "I give and bequeath to my beloved wife, Susan, one third of all my property, both real and personal, and to have and control my farm as long as she remains my widow, . . . . and at the death of my wife all my property both real and personal to be equally divided between my eight children." The question raised was whether the widow took a fee or only a life estate in the one third, and the court decided that she took a fee.

In *Campbell v. Beaumont* (*supra*), the will provided: "I leave to my beloved wife, Mary Ann, all my property, . . . . to be enjoyed by her for her sole use and benefit, and in case of her decease the same, or such portion as may remain thereof, it is my will and desire that the same shall be received and enjoyed by her son, Charles Lewis Beaumont, requesting him at the same time, that he will use well and not waste-fully squander, the little property that I have gained

by long years of toil." The court say: "This latter clause seems insufficient to limit the wife's estate or interest, and rather to have been intended to express the natural anticipation of the testator that this property, or some of it, would as a matter of course go from the mother to her child, and his acquiescence in such devolution coupled with the hope that what he had painfully acquired should not be wasted." And the court reiterates the principle, that, in construing wills, the general rule requires the intention of the testator to be regarded. But as this will did not show a clear intention on the part of the testator to limit the interest of the wife to a life estate, it held that the wife took an absolute title. In *Wager v. Wager* (96 *N. Y.*, at p. 173), the court defines what it intended to decide in this case of *Campbell v. Beaumont*.

The above cases, as well as, *Norris v. Beyea* (13 *N. Y.*, 286); *Bundy v. Bundy* (38 *N. Y.*, 410); *Cohen v. Cohen* (4 *Redf.*, 48), have been decided since the enactment of the Revised Statutes, and are referred to by the counsel for Mrs. Simpson, to establish the rule, that, where a testator has made an unqualified bequest or devise, and has thus evinced his intention to give the first taker the right to use the entire estate for his own benefit, with a limitation over to some other person, such limitation over is void, as being repugnant to the absolute control and right of the first taker.

The cases of *Jackson v. Bull* (10 *Johns.*, 18); *Westcott v. Cady* (5 *Johns. Ch.*, 334); *Hill v. Hill* (4 *Barb.*, 419); and *Van Horn v. Campbell* (100 *N. Y.*, 287), were either decided, or construe wills drawn

and probated, before the enactment of the Revised Statutes. Under the common-law, the language of the "Second" provision, which gives to the first taker the right of absolute disposition, might render a subsequent limitation repugnant and void. The Revised Statutes, however, have changed this rule. Sections 32 and 33, 3 R. S., 7th ed., 2178, provide as follows:

"§ 32. No expectant estate can be defeated or barred by any alienation, or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseisin, forfeiture, surrender, merger or otherwise."

"§ 33. The last preceding section shall not be construed to prevent an expectant estate from being defeated in any manner or by any act or means, which the party creating such estate shall, in the creation thereof, have provided for or authorized; nor shall an expectant estate thus liable to be defeated be on that ground adjudged void in its creation."

By § 2, 3 R. S., 7th ed., 2256, the rule stated in the above provisions, as to future estates in lands, is made applicable to personal property, and a remainder over may be limited upon such a bequest (*Smith v. Van-Ostrand*, 64 *N. F.*, 278; *Norris v. Beyea*, 13 *N. F.*, 273; *Manice v. Manice*, 43 *N. F.*, 382).

The estate intended to be created here was a contingent future remainder, and, under the above provisions of the Revised Statutes, was such an estate as the testatrix had the right to create, and when the defeating contingency had been rendered impossible by the death of the first taker—the husband,—then the daughter, Mrs. French, had the right to immediate

possession. The "Second" provision of this will provides "and wish my said husband to do with said property as he shall think best during his lifetime." And the "Fourth" provision, where she gives her own construction to the will, provides: "I wish it to be distinctly understood that my said husband may use so much of my real and personal property as he may wish to during his lifetime and if at his death there be the sum of eight thousand dollars remaining in his hands that that amount be paid to my daughter Mrs. F. A. Churchill." These clauses limit the disposition of the estate by her husband to his lifetime; during that period he has the right to use and dispose of the whole estate, and this right is not limited to his maintenance and support. He may provide himself with the comforts and luxuries of life—with anything that will gratify his appetites or his tastes; but after she has thus made full and ample provision for the comfort of her surviving husband, even to the full measure of her estate, she by the same instrument disposes of what shall remain, if any there be, and, for reasons only known to herself, gave the same to one of her two daughters.

It is plain that the testatrix did not intend that her husband should have any other right in or control over her property than to use so much of it as he desired during his lifetime. She herself, by the same will under which the husband acquires the right to use and enjoy the whole if he so desires, provides and directs where the balance left at his death, to the amount of eight thousand dollars, shall go, viz.: to her daughter, plainly implying that her husband while



he might diminish the estate, even to its entire exhaustion, must do so during his lifetime. If, after all his wants have been supplied and his tastes gratified, any remained unexpended, that remainder he cannot dispose of by will.

This view of this case seems to be sustained by numerous decisions in this and other states (Terry v. Wiggins, 47 *N. Y.*, 512; Greyston v. Clark, 41 *Hun*, 125; Flanagan v. Flanagan, 8 *Abb. N. C.*, 413; Colt v. Heard, 10 *Hun*, 189; Wager v. Wager, 96 *N. Y.*, 164; Burleigh v. Clough, 52 *N. H.*, 267; Smith v. Bell, 6 *Peters, U. S.*, 68).

Some of the cases construing bequests similar to the one in this will (Smith v. Van Ostrand, 64 *N. Y.*, 278; Wright v. Miller, 8 *N. Y.* 24; Bell v. Warn, 4 *Hun*, 406; Thomas v. Pardee, 12 *Hun*, 151), in sustaining their validity, base the decision upon the fact that the first taker is given the right to use the whole estate for maintenance and support. That such, at this time, is the settled law, is unquestioned, but it seems to me too narrow and technical, for, in some of these same cases, it is also held that the first taker has the right to the absolute possession of the estate during life, and what interested party or court will assume to dictate whether such first taker shall pay one dollar or ten dollars per day, for board,—whether he shall pay fifteen dollars or five hundred dollars for a suit of clothes,—whether the walls of his apartments shall be bare, or covered with pictures and paintings of an expensive kind, and purchased to gratify his tastes. The decisions may name maintenance and support as the ground, but when they give such first

taker the possession of the property their effect is to permit such first taker to dispose of the entire estate either for his maintenance, support, comfort, taste or fancy, and make him the sole judge.

I am of the opinion that the true rule and reason is that given by Judge PECKHAM, in *Greyston v. Clark* (*supra*), viz.: that a contingent remainder or future estate is authorized by the Revised Statutes, and is valid even though the first taker is permitted to dispose of the whole during his lifetime for purposes other than his maintenance and support, and thus by his will or volition defeat such contingent estate. The construction asked for by the contestant requires that much more than one half of this will, in which she makes provision for her daughter be entirely ignored and allows the provision she makes for her husband to stand. Such was not the intention of the testatrix, and as the provision made for her daughter is authorized by the Revised Statutes, effect must be given to the whole will.

My conclusions therefore are: that the plain intention of the testatrix, as gathered from the whole will, was that her husband should have the right during his life to use the estate even to its exhaustion, and for purposes other than his support and maintenance, but if at his decease any remained, this remainder, to the amount of \$8,000, her husband should not dispose of by will, but she herself bequeathed it to her daughter Mrs. F. A. French; that the testatrix had the right, under the Revised Statutes, to create by will a contingent remainder, or future estate, and by the same will authorize or permit the first taker to do some act

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which would defeat such future estate; that John Hitchcock, the husband and first taker, having died leaving unexpended the portion of Phebe Hitchcock's property mentioned and described in Schedules A. and B. of the account in this matter, subject to the expenses of administration, and such sum being less than eight thousand dollars, the same belongs to Mrs. Frances A. French under the "third" and "fourth" provisions of the will, and a decree will be entered accordingly.

Costs of this accounting, to be taxed by the Surrogate and paid out of the estate, are allowed to the executrix.

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ORANGE COUNTY.—HON. R. C. COLEMAN, SURROGATE.—October, 1887.

## MATTER OF MILLER.\*

*In the matter of the estate of MARY E. MILLER, deceased.*

A decree of a Surrogate's court assessing a tax upon the passing of property, under the "collateral inheritance tax act" (L. 1885, ch. 488), is confirmatory of the right of the People of the State, created by the statute, and establishes an additional right—that of recovery—by virtue of itself.

Such a decree cannot be vacated, as having been inadvertently made, upon a motion based on a change in the law effected by a statute passed after the rendering of the decree, and before payment of the tax.

DECEDENT died September 30th, 1886, leaving a will

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\*Surrogate's order affirmed, 47 Hun, 394.

## MATTER OF MILLER.

which was admitted to probate by the Surrogate of Orange county in October, 1886. On March 24th, 1887, her executors procured an order from the Surrogate affirming an appraisement and making an assessment of the collateral inheritance tax under L. 1885, ch. 483. Francis Lynch, an adopted son of the testatrix, was a devisee and legatee under the will, whose interest was appraised at the sum of \$223,262; and, at the time of this application, the tax had not been paid by the executors to the county treasurer.

After the passage of L. 1887, ch. 713, an application was made to the Surrogate, in behalf of Francis Lynch, to vacate the order of March 24th, 1887, as having been inadvertently made and upon points stated in the brief of petitioner's counsel.

E. L. FANCHER, *for the motion*:

*First.* The Legislature has power to tax, which is exclusive, and unrestrained except by constitutional inhibition. It was competent to pass the act of 1885, and to amend and repeal parts of it by the act of 1887.

*Second.* The latter act amended the former, and repealed all conflicting provisions. No question of contract or vested interest was involved.

*Third.* Section 1 of the earlier act was thus obliterated, and the first section of the later act substituted.

*Fourth.* The design of the act of 1887 was not merely to provide for future cases, but to correct errors and make further exemptions.

*Fifth.* The later statute is retrospective.

*Sixth.* No reservation is contained in the later stat-

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ute, whereby a tax, not therein allowed, can, under the earlier, be enforced.

**THE SURROGATE.**—At the time this order was entered, the law of 1885 was in full force, and there can be no question but that, at that time, the order was properly made,—the legacy being then subject to the tax, and the legatee having had legal notice of the appraisal of the legacy, as appears by the files in this office.

By § 4 of that act, the tax is made due and payable at the death of the decedent, that is, September 30th, 1886. When the will of the testatrix was admitted to probate and the rights of the legatees therein named were thereby established, then the right of the People of the State of New York to the tax became absolutely vested, and the right related back to the death of the testatrix. The order confirming the report of the appraisers and assessing the tax, not only determined the amount of the tax, but closed the transaction as between the parties—the people and the legatee, by a decree of a competent court. This decree was confirmatory of the right given by the statute, and established in the People an additional right of recovery, by virtue of itself.

If the testatrix had died since the passage of the law of 1887, clearly the legacy to this petitioner would not have been subject to this tax. There is nothing in the act which, in words, released the tax on this legacy, which had become due and payable under the law of 1885. Did the act of 1887 affect such tax in any way?

It is claimed, on behalf of the petitioner, that, by the repealing clause of the act of 1887 and the enactment of § 1 of that act, the first section of the law of 1885 was obliterated, and § 1 of the law of 1887 substituted in its place, except as to transactions passed and closed; and that, inasmuch as the executors have not paid over the amount of the tax, that this court should vacate its former order directing the payment, as having been inadvertently and improperly made, because, as he claims, his legacy is not taxable.

I am unable to see how, as to this legacy, the law of 1887 so supersedes the law of 1885, as to discharge a tax which had become due and payable by the latter, or how an order, which was properly made at the time it was made, can afterwards be, by a subsequent change of the law, treated as having been inadvertently and improperly made. The law of 1887, as to the class of persons to which the petitioner belongs, cannot be regarded as construing the law of 1885. It is a change of that law. It is not necessary to consider, now, what the effect of the passage of the law of 1887 has been, upon the provisions for enforcing the payment of the tax; for, whether they remain, or have been repealed, or the provisions of the law of 1887 apply, this does not determine the legality of this order.

The motion of the petitioner will, therefore, be denied.

ORANGE COUNTY.—HON. R. C. COLEMAN, SURROGATE.—January, 1888.

BULL v. WHEELER.

*In the matter of the probate of the will of SUSAN C. BULL, deceased.*

Two conditions are essentially prerequisite to the availing of a will on the ground of delusion entertained by the testator: (1) that it be an *insane* delusion; and (2) that it be shown to have affected the testamentary disposition.

In determining the question of the insanity of a delusion, regard must be had to the temperament and other personal peculiarities of the testator; since what might be mere eccentricities, in one person, would, in another, afford evidence of mental aberration.

The evidence, on the subject of the insane delusion, alleged by contestant to have existed in the mind of testatrix, his sister, showed the same to consist of an unjust belief that the former had, in some way, obtained more than his fair share of their father's property, and had deprived her of privileges in the use of a horse and wagon, and in the garden, to which she was entitled under that parent's will. Testatrix, an unmarried woman, who died at the age of fifty-one years, was a person of feeble health and nervous temperament; had, in early life suffered from attacks of hysteria; possessed marked personal peculiarities, was of more than ordinary capacity, and active in religious matters. She was evidently actuated by an intense dislike of contestant, who was excluded from the number of her beneficiaries; but the proofs failed to show that her feelings could not have been changed by evidence that she was mistaken in her judgment concerning contestant's conduct.—

*Held*, that the will must be sustained.

Clapp v. Fullerton, 84 N. Y., 190—compared.

DECEDENT died, unmarried, May 9th, 1887, leaving an estate of about \$60,000, a will dated July 7th, 1881, and two codicils thereto, the first dated February 15th, 1884, and the other September 28th, 1886.

By the last codicil, the testatrix revoked a legacy

given in the will to the Presbyterian church in Chester, and gave the same amount to the American Bible Society, because of her dissatisfaction with that church for not entertaining and acting upon her complaint of unchristian treatment by her brother, in matters relating to property. The other facts sufficiently appear in the opinion.

JOHN J. BEATTIE, *for executrices.*

HENRY BACON, *of counsel.*

D. F. & H. GEDNEY, *for contestant, Charles R. Bull.*

THE SURROGATE.—This contest is based not upon general want of testamentary capacity, but upon the existence in testatrix' mind of such insane delusions as directly affected the disposition of her property, coupled with a degree of undue influence on the part of Mrs. Zabriskie, which taken together invalidated this will. The contestant is Charles R. Bull, a brother of the testatrix, and her other next of kin are her two sisters, Mrs. Wheeler and Mrs. Zabriskie.

By her will, after making a few bequests of personal ornaments, household furniture and wearing apparel, the testatrix gives legacies of \$200 each to all her nephews and nieces, including the children of Charles R. Bull; \$2,000 to her niece, Carrie S. Zabriskie; \$500 to the Orange County Bible Society; \$500 to the American Bible Society; and the residue equally to Mrs. Wheeler and Mrs. Zabriskie.

The evidence fails to connect Mrs. Zabriskie with the making of the will, except by remote implication.



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The alleged insane delusion is that the testatrix unjustly believed that the contestant had wronged her in the settlement of their father's estate, and that this belief had so taken possession of her mind as to have dominated and controlled her in the disposition of her property.

Just in what particular she believed he had wronged her does not clearly appear, but it would seem to have been that in some way he had obtained more than his fair share of their father's property and that he had deprived her of certain privileges in the use of a horse and wagon and in the garden, which she believed herself to be entitled to under her father's will. As to the justness of this charge, I think it can fairly be adduced from the evidence that, in his connection with the estate of his father, Charles R. Bull had only availed himself of his legal rights. Whether those rights gave him more than a fair share of the estate does not appear, but Miss Bull evidently believed that he had, and that he had dealt ungenerously and graspingly towards the other members of the family. In the eyes of outside and disinterested persons, she certainly made very much more ado about the matters of which she complained than their importance warranted; and to such persons she would certainly seem to have acted in a very unforgiving and unchristian manner for one of her religious professions. But, can it properly be claimed that her mind was so affected upon this subject as to amount to insanity?

It is argued in support of the claim that her mind was so affected that this delusion was not the only one which had found a lodgment in Miss Bull's mind

—that her mind had become unsettled upon religious matters—that she was a religious enthusiast—had carried her belief to unusual extremes regarding trifling matters, and believed herself cured of bodily ailments by what is known as “the faith cure.”

Miss Bull lived to attain the age of about fifty-one years. She was known as a person of rather feeble health—was of a very nervous and excitable temperament. In early life, about the time of passing from girlhood to womanhood, on several occasions had suffered quite serious attacks, apparently in the nature of hysteria, during which her acts were irrational. These attacks, however, were of short duration, and later she became a person sufficiently strong to ordinarily participate in the duties and pleasures of life in moderation. She was undoubtedly a person of marked mental peculiarities, of more than ordinary business capacity, and in later years very active in her connection with religious matters.

It is necessary to consider these facts and characteristics of Miss Bull in order properly to judge her conduct, for what might be in one person mere eccentricities and personal peculiarities might in another become evidences of insanity. Thus, in her case, we would naturally expect to find in her religious life the intense phases, personal activity, practical application of beliefs even in trivial matters, and also the not uncommon accompanying trait in such characters, decided inconsistencies. Hence her unforgiving feeling towards her brother.

An insane delusion is exhibited in the belief of facts which no rational person would have believed, and

the inability to be reasoned out of such belief (*Matter of Tracy*, 11 *N. Y. S. Rep.*, 103). After carefully considering all the testimony in the light of this legal definition of an insane delusion, I am unable to see in Miss Bull's feelings and conduct towards her brother anything more than an intense dislike—perhaps hatred—of him, which may have, and probably did, influence her in making her will, and though persisted in with a sort of feminine obstinacy, still I can see no reason for believing that her opinion of him could not have been changed at any time by evidence showing that she was mistaken in her judgment of his conduct in regard to her father's estate.

Now whether this dislike was justly or unjustly entertained is not, in law, material—for the law recognizes the fact that all are more or less influenced in the disposition of their property by their likes and dislikes, and it will not interfere even though natural claims are ignored for the reason that, generally speaking, one may dispose of his own as he chooses. Of this the case of *Clapp v. Fullerton* (34 *N. Y.*, 190) is a marked instance. In that case, the testator, late in life, many years after his wife's death, came to believe from a recollection of things said by her while delirious and on her death bed, that she had been untrue to him, and that the daughter born to them was not his child; and, acting upon this belief, which was undoubtedly a mistaken one, he disinherited the daughter. Earlier in life, when his mind was healthy and vigorous, he had dismissed the delirious statements as having no foundation, but with lapse of time and waning mental powers he came to believe them, and

changed the disposition of his property. In the opinion of the court, it is said, this belief "should be referred to weakness and credulity, rather than to insane delusions," and that "the right of a testator to dispose of his estate depends neither upon the justice of his prejudices nor the soundness of his reasoning, . . . . the law gives effect to his will, though its provisions are unreasonable and unjust." "Courts should not confound perverse opinions and unreasonable prejudices with mental alienations" (Seamen's Friend Soc. v. Hopper, 33 N. Y., 619). The recent case of Tracy (*supra*) is another case in point. There the testator, an exceedingly dissipated man, made a very small provision, in proportion to his estate, for his only daughter, because of his dislike and hatred of her mother. The will was sustained, although conceded to be very unjust and notwithstanding the testator had undoubtedly been mistaken in regard to many matters about his daughter, because of the right of the testator to dispose of his property in this manner if he so desired.

I am of the opinion that the will of Miss Bull was legally executed; that she was of sound mind; that she was not unduly influenced by any person in the disposition made of her property; nor did there exist in her mind any insane delusion which affected such disposition.

An order will, therefore, be entered, admitting the will to probate.

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BEECHER V. BARBER.

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CHENANGO COUNTY.—HON. W. F. JENKS, SURROGATE.—April, 1888.

BEECHER v. BARBER.

*In the matter of the judicial settlement of the account of DAVID G. BARBER, as surviving executor of the will of ROBERT B. GRISWOLD, deceased.*

Upon the judicial settlement of executors' account, it appeared that certain creditors, whose claims the testator, in his will, had directed to be paid, had received more than the amounts specified in that instrument, but not more than was justly due.—

*Held*, that the executors' course was justifiable....

Testator, during his lifetime, being a pensioner of the United States government, received from a pension agent, in the usual manner a draft for \$1,200, deposited the same in bank, and obtained a certificate of deposit, which he held at the time of his death, and the amount whereof was collected by the executors of his will, upon surrender of the certificate.—

*Held*, that this money was not protected from the claims of decedent's creditors, either by U. S. R. S., §§ 4718, 4747, or by Code Civ. Pro., § 1893; but was assets in the surviving executor's hands, properly applicable to the payment of debts.

Burgett v. Fancher, 35 Hun, 647—distinguished; Hodge v. Leaning, 2 Dem., 553—disapproved.

CONTEST, as to disposition of pension moneys, in executor's hands, upon judicial settlement of his account. The facts are stated in opinion.

WILL C. MOULTON, *for executor.*

H. D. NEWTON, *special guardian, and attorney in person.*

GEORGE M. TILLSON, *in person, and for H. H. Beecher, creditors.*

THE SURROGATE.—The testator was a pensioner of  
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the United States government. He received, in the usual way of paying pensions, the check or draft of the pension agent, for \$1,200. For this check, the National Bank of Norwich gave him its certificate of deposit for \$1,200, payable to himself. He held this certificate at the time of his death, and his executors received the money upon its surrender. He received other pension moneys, a part of which he sent to the agent who obtained his pension certificate, and held his note therefor when he died. Upon this note the executors collected the sum of \$140.28.

The testator, in his will, directed his executors to pay certain debts. Those debts have all been paid. Other claims have been presented to the executors, and accepted by them as valid debts against the estate, but have not been paid. Some of the creditors named in the will demanded a larger sum than the testator directed his executors to pay, and the executors paid them more than the will directed but no more than was justly due. It is urged, upon this accounting, by the special guardian for the infant heir and legatee, that no greater sum, paid to creditors, should be credited to the executors, than what was directed to be paid by the testator in his will; and that no claims that have been presented and allowed but not paid, should be decreed to be paid upon this accounting, upon the ground that the entire assets of the estate consist of pension money, which is exempt from the payment of debts by United States statute.

Section 4747 of the revised statutes of the United States is as follows: "No sum of money due or to become due to any pensioner shall be liable to attach-

ment, levy or seizure, by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of the pensioner."

In *Jardain v. Fairton Sav. Fund Ass.* (44 *N. J. Law Rep.*, 376), it was held that money due for pensions, while it remains in the hands of the disbursing officer or agent for distribution, or while in course of transmission to the pensioner is not liable to be seized by creditors under any legal process, but that, after it has come to his hands, it is so liable, like any other funds of the debtor. *Spelman v. Aldrich* (126 *Mass.*, 113); *Friend in Equity v. Garcelon* (1 *Eastern Rep.*, 57); *Burgett v. Fancher* (35 *Hun*, 647); *Stockwell v. Bank of Malone* (36 *Hun*, 583), are to the same effect.

No other construction can reasonably be put upon the language of this statute. After its receipt by the pensioner, it is neither "money due or to become due." The government only shields the pension money from creditors while it remains in the pension office, or is being transmitted to the pensioner. The moment it reaches the pensioner, the protecting care of the government ceases. After its receipt, it is liable to the claims of creditors, and is in no manner protected against unwise or improvident disposition. But a different rule applies to accrued pension, not received by the pensioner during life. The accrued pension, to the date of the testator's death, came to the hands of the accounting party, not as executors but as testamentary guardians of the infant child, and

forms no part of the assets of this estate. Section 4718 of the U. S. Revised Statutes provides that "if any pensioner has died or shall hereafter die, . . . . his widow, or if there is no widow, the child or children of such person under the age of sixteen years, shall be entitled to receive the accrued pension to the date of the death of such person. Such accrued pension shall not be considered as a part of the assets of the estate of deceased, nor liable to be applied to the payment of the debts of said estate, in any case whatever; but shall inure to the sole and exclusive benefit of the widow or children." This section only exempts the "accrued pension" not received by the pensioner. Pension money received by the pensioner is not exempt by United States statute, but is part of the assets of the estate, and liable to the payment of debts; and the accrued pension not drawn by the pensioner would have been equally liable, but for this section.

The contestant also claims that this money is not liable for the payment of debts under § 1393 of the Code of Civil Procedure. This section provides that "the pay and bounty of a non-commissioned officer, musician or private, in the military or naval service of the United States; a land warrant, pension or other reward, heretofore or hereafter granted by the United States or by a State, for military or naval services; a sword, horse, medal, emblem or device of any kind, presented as a testimonial for services rendered in the military or naval service of the United States; and the uniform, arms and equipments which were used by a person in that service, are also exempt from levy



and sale, by virtue of an execution, and from seizure for non-payment of taxes, or in any other legal proceeding." This section is broader in its scope than the Act of Congress, because it exempts pension money *in the hands of the pensioner* from creditors and payment of taxes. The exemption does not apply to property purchased with pension moneys, nor to securities taken on the loan of such money (*Wygant v. Smith*, 2 *Lans.*, 185; *Youmans v. Boomhower*, 3 *T. & C.*, 21, 26). Therefore, the money received by the executors upon the note is applicable to the payment of debts, and the note in the testator's hands could have been reached by his creditors.

Could his creditors, during his life, have reached the money deposited in bank? *Stockwell v. Nat. Bank of Malone* (36 *Hun*, 583; 3d dep't., May, 1885), seems to hold to the contrary, but Justice BOCKES expresses his doubts in a well considered opinion, based upon reason and authority. In *Burgett v. Fancher* (35 *Hun*, 647; 5th dep't., March, 1885), the pensioner deposited pension money with a firm of private bankers. The court, BAKER, J., says: "The memorandum delivered to him by the bank is not, in a commercial sense, a certificate of deposit, nor was it intended to be, for the appellant was authorized to draw against the deposit without the return of the certificate. It is nothing more than a teller's ticket, issued in the hurry of business, and does not purport to show the real transaction between the parties. It would be difficult to formulate a general proposition by which to determine when the pay and bounty of a soldier has lost the protection of the statute; each case must be ad-

judicated upon its own state of facts." I infer that, if the usual certificate of deposit, "in a commercial sense," had been given, as in the case at bar, a different conclusion would have been reached. When the usual certificate of deposit is taken for money deposited in bank, the identical money is parted with, without any intention or power of reclamation. The relation of debtor and creditor exists between the bank and its depositor, the same as though the money had been lent to a private person, payable on demand. Without attempting to reconcile these cases, I think the exemption created by § 1393 of the Code has no application after the pensioner's death. Pension accrued, but not drawn, is protected by § 4747 of the United States statute, and, by § 4718, is made payable, in case of his death, to the widow and children; but farther than that, neither Congress nor our own legislature has attempted to go. Federal legislation extends its protecting care over the money till it reaches the pensioner, or his family in case of his death. Our State legislature shields it while it remains intact in his own hands, and no longer. It has not attempted to exempt the family, after his death, from payment of his honest debts. My attention has been called to but one case involving this proposition, that of *Hodge v. Leaning* (2 Dem., 553), in which the learned Surrogate of Otsego county held that pension money in the executor's hands constituted no part of the assets of the decedent's estate. His opinion seems to be based upon the sections of the United States statutes heretofore quoted and which, the cases cited hold, have no application to a case where the money has reached the pensioner's hands.

## BEECHER V. BARBER.

*Prima facie*, all the property of a judgment-debtor is liable for debts; and if he would claim an exemption, he must bring himself within some exemption act (Dains v. Prosser, 32 Barb., 290; Twinam v. Swart, 4 Lans., 263). In Crosby v. Stephan (32 Hun, 478), the question was whether a creditor of a widow, in supplementary proceedings, could reach the money received by her on a policy of insurance taken out by the husband for the benefit of his wife. The court (page 480) say: "She is under the common obligation of all persons to pay debts, and unless the law has expressly exempted this property, it is liable. We must not permit sympathy for the widow to outweigh an application of the claims of common honesty." I think the principle applies equally well to this case. So does the following language of Justice STORY, quoted by Justice ALLEN, in Allen v. Cook (26 Barb., 380): "Arguments drawn from hardship, impolicy or inconvenience are entitled to little weight. The only sound principle is to declare '*ita lex scripta est*,' and it would be going too far to make exceptions which the legislature has not made." "A court of law ought not to be influenced," says another distinguished jurist, "or governed by any notions of hardship; cases may require *legislative interference*, but judges cannot modify the law."

The salary of a public officer, not due, or not actually paid, cannot be attached by creditors or reached in supplementary proceedings, nor can public officers, by any act of their own, assign or encumber it, before it becomes due (Columbian Institute v. Cregan, 11 Civ. Pro. R., 87; Waldman v. O'Donnell, 57 How.

*Pr.*, 215; *Remmey v. Gedney, id.*, 217; *Bliss v. Lawrence*, 58 *N. Y.*, 442). But it has never been held that, when received, it could not be reached by creditors, or, in case of the officer's death, that it would not be applicable to the payment of debts.

The payments to those creditors named in the will of a larger sum than the will directs is, therefore, approved; and the decree will direct the payment of such of the claims as have been presented and allowed as valid claims by the executors.

Objection is made to the payment of the claim of Mr. Manning, on the ground that it is outlawed. As it appears, on the face of this claim as presented, that more than eight years had elapsed at the time of the testator's death since the last item in the account accrued, the claim must be disallowed. The personal claim of the executor, D. G. Barber, of \$19, was not one of those provided for in the will, and no proof has been given on this accounting of its correctness. It seems to have been paid to him as a legatee by his co-executor, under the impression that the will directed its payment. That item in schedule E. of the account is, therefore, disallowed. It appears, from the inventory, that the \$150, to which the infant heir was by statute entitled, was not set off to her in the inventory. The decree will, therefore, direct the payment of that amount to such infant, in addition to her legacy (*Vedder v. Saxton*, 46 *Barb.*, 189; *Sheldon v. Bliss*, 4 *Seld.*, 31).

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MATTER OF SOULE.

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CAYUGA COUNTY.—HON. J. D. TELLER, SURROGATE.—  
September, 1887.

MATTER OF SOULE.\*

*In the matter of the application for revocation of probate of the will of LYMAN SOULE, deceased.*

The test of the propriety of allowing an amendment of process, asked for, under Code Civ. Pro., is—to inquire whether the character of the action or special proceeding will be thereby changed; if not, and the proper parties in interest have had due notice, any amendment may be made in the names or description of parties which will conform to the intention manifested in the pleadings.

In a special proceeding instituted under Code Civ. Pro., § 2647, to procure a decree revoking the probate of decedent's will, a sufficient petition having been duly filed, a citation was issued and served, regular in other respects, but directed to the executors in their individual names, without designation of their representative character. After the expiration of the sixty days specified in Code Civ. Pro., § 2517, the individuals holding letters appeared by counsel, for the sole purpose of moving to dismiss the petition, upon the ground of the failure, as against the executors, to commence the special proceeding within the time limited by statute (Code Civ. Pro., § 2648).—

*Held*, that the court had power, under Code Civ. Pro., §§ 721—730, 2538, to amend the citation by the insertion of a description of the executors as such; and that, the exercise of this power being in furtherance of justice, the motion must be denied.

*Fountain v. Carter*, 2 *Dem.*, 313—distinguished.

A PETITION was filed, March 25th, 1887, asking a revocation of the probate of the will of decedent, admitted to probate in this court June 28th, 1886. The grounds upon which revocation was demanded were fully specified in the petition. The names of the executors of the will, who had all duly qualified, and of

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\*See p. 448, *post*.

## MATTER OF SOULE.

the legatees named in the will, were all set forth. The petitioner alleged that she was an heir-at-law and next of kin, as well as legatee, and as such interested in the estate of decedent, and she prayed for a decree revoking probate, and for such other relief as might be just, and "that the said executors and all the devisees and legatees named in said will and codicils, and other persons who are parties to the proceedings in which said probate was granted be cited to show cause why said probate should not be revoked," etc. Upon this petition, on the same day it was filed, a citation was issued by the Surrogate, directed to all the parties named in the petition, the names of the executors being first given, and each one being repeated among the other names, but they were not, anywhere in the citation, designated as executors. Upon the return day named in the citation, June 7th, 1887, the petitioner and certain of the parties cited appeared; special guardians were appointed for the infant parties; and the proceeding was duly adjourned until July 6th, 1887, when the parties who were executors appeared by counsel, for the sole purpose of moving to dismiss the petition. There had been no appearance by the executors as such, and no general appearance by the individuals who were the executors.

H. V. HOWLAND, *for the motion.*

M. M. WATERS, and WOODIN & WARREN, *for petitioner, opposed.*

W. E. HUGHITT, and M. A. KNAPP, *for legatees.*

THE SURROGATE.—The question, presented by the motion to dismiss this proceeding, is whether this court

## MATTER OF SOULE.

has any jurisdiction of the necessary persons or subject-matter. It is contended by the moving party that, the executors not being named as such in the citation, there has been an utter failure to comply with the statute, by which the authority of this court is conferred. There is no contention that the petition does not set forth the necessary facts, or that the prayer itself does not conform to the requirements of the statute; and had the citation followed the demands of the petition, the motion would have had no foundation. The petition was filed within the time prescribed by law. By § 2517 of the Code of Civil Procedure, it is enacted that: "The presentation of a petition is deemed the commencement of a special proceeding, within the meaning of any provision of this act, which limits the time for the commencement thereof. But in order to entitle the petitioner to the benefit of this section, a citation issued upon the presentation of the petition must, within sixty days thereafter, be served, as prescribed in § 2520."

The time for the service of a citation having elapsed, this proceeding must stand, if at all, upon the service already made. No new or supplementary citation can be of any avail; and it becomes necessary to determine whether service upon the executors of a citation, directed to them as individuals without their official title, confers jurisdiction upon this court to proceed as against them and to grant an amendment to the citation to conform it to the petition. If the court has this power, I think it ought to be exercised, as the objection raised is purely technical, and does not reach the merits of the proceeding.

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The citation was served within the time required to give the petitioner the benefit of § 2517, and upon the proper persons. The rules relating to amendments in other courts of record (Code, §§ 721-730) are made applicable to proceedings in Surrogates' courts (§ 2538). Section 723 of the Code provides: "The court may, upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice and on such terms as it deems just, amend any *process*, pleading or other proceeding by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect."

No amendment can be allowed which changes the character of the proceeding. The petition, which bears the nature of a pleading in an action, and the object of which is to apprise the court and parties of the character of the proceeding, the relief sought and the grounds therefor, has set forth the executors in their official capacity, and is in no respect different from what would be required to authorize a citation addressed to the executors as such. Any party, referring to the petition, would be informed as to the facts upon which revocation of probate is sought, and as to who the parties thereto were intended to be. The names of all the executors appear twice in the citation. The proper parties were served. They are presumed to know of the filing of a petition. They had access to it, and must be deemed to have seen and known its contents. It is made the duty of courts to disregard any error or defect in proceedings which shall not affect the substantial rights of parties.



## MATTER OF SOULE.

The omission complained of would seem to have been a clerical error on the part of the person writing out the citation. In these circumstances is it not within the power of this court to amend the citation to make it correspond with the petition?

In *Bank of Havana v. Magee* (20 *N. Y.*, 355) one Charles Cook, who had been carrying on a banking business under the name of "The Bank of Havana," brought an action in that name, which ought to have been in his individual name. The Court of Appeals held the proceedings were all amendable under § 173 of the Code, which was similar to § 723 of the Code of Civil Procedure. The court say, it is apparent from the pleadings that the parties understood each other perfectly and that it was the duty of the court below, when the objection was taken, to order the pleadings to be amended.

In *Risley v. Wightman* (13 *Hun*, 163), the defendant denied that the plaintiff was ever appointed executor. The evidence showed that plaintiff had been appointed administrator with the will annexed. The court held that the complaint was amendable, that it did not change the rights of the parties and constituted a mere technical variance.

In *Phillips v. Melville* (10 *Hun*, 211), it was sought, after taking evidence, to amend the summons and complaint, by changing the action by an administratrix to one in her own favor individually. It was held that the change could not be made, for the reason that it made a new action, distinct and separate from the manner in which it had been commenced.

In *Tasker v. Wallace* (6 *Daly*, 364), an action

against a stockholder, upon a judgment recovered in a suit brought against "The West Side Railroad Company," under which name the judgment was recovered, upon motion afterward made, the court allowed the summons, complaint, judgment-roll and execution to be amended to make the title of the defendant, "The West Side and Yonkers Railroad Company." It was held that, as the summons had been served upon the proper officers of the company, and as the amendment did not create another or different action, it was properly allowed.

In *Tighe v. Pope* (16 *Hun*, 180), plaintiff moved for leave to amend the summons and complaint by striking out the words "as administratrix," and to proceed against the defendant personally. It was held by the General Term of the Supreme Court that the motion was proper and should have been granted, as it would have worked no change in the cause of action. The same person would be defendant, and no increased burden would be imposed upon her. In *Haddow v. Haddow* (3 *T. & C.*, 777), affirmed by the Court of Appeals, an action by a person in her own right was changed to one in her own favor as administratrix. In *N. Y. Monitor, etc., Co. v. Remington Agr. Works* (25 *Hun*, 475), it was held by the General Term that an amendment was permissible, striking out the defendant's name and substituting the names of the three partners who had purchased the defendant's business and were carrying it on under the defendant's name. This decision was reversed by the Court of Appeals (89 *N. Y.*, 22), but upon the ground that the effect of the amendment was to change

## MATTER OF SOULE.

the action to one against other and different parties. The company named represented stockholders and different interests from those represented by the parties sought to be made defendants. The court says: "While full authority is conferred for adding or striking out the name of a person or a party, or correcting a mistake in such name, it does not sanction an entire change of name of the defendant by the substitution of another or entirely different defendants. In *Van Cott v. Prentice* (104 *N. Y.*, 57), an action against defendants as executors, the complaint alleged that the defendants held certain property in their representative capacity, which defendants admitted. The complaint conceded that the defendants asserted no other title or claim. After trial, a motion was made to amend the summons and complaint and ordering the judgment awarded to be entered against the defendants, individually and *de bonis propriis*. It was held that the amendment substituted a new and different cause of action, which as individuals the defendants had had no opportunity to defend.

In *Fountain v. Carter* (2 *Dem.*, 313), a proceeding for the revocation of probate of a will, a petition had been filed within a year, the citation was served within sixty days, upon the executor, but no service whatever had been made within that time upon any other person entitled to be made a party. It was held by the learned Surrogate, and very properly, that the proceeding should be dismissed. The time for further services had elapsed, and the petitioner had forfeited the benefit of § 2517. In *Stilwell v. Carpenter* (62 *N. Y.*, 639), defendant moved to dismiss the complaint

on the ground that the proof showed the plaintiff had no interest in her representative capacity. Held, that, as a cause of action was established in favor of the plaintiff, personally, and the complaint showed that she brought the action both as devisee and executrix, the motion was properly denied.

The rule laid down in the early cases was that process was not amendable, where it appeared void upon its face. It was held void for what it contained, but not for the omission of some essential requirement. This the court would allow supplied, as for instance, the clerk's signature, the seal of the court, or the name of the defendant, after the writ was executed and the defendant was in custody under it (1 Tidd's Pr., 161). The test, as to whether an amendment of a process is proper under the Code, appears to be whether the character of the action or proceeding will thereby be changed, and, if not, and the proper parties in interest have had due notice, any amendment may be made in the names or description of parties which will conform to the intention as shown in the pleadings. I cannot see that there is any prohibition against the continuance of this proceeding. I think the court has jurisdiction of the parties and subject-matter, and an amendment of the citation should be made in the interests of justice, showing the official character of the executors.

The other ground of the motion ought not to be passed upon without hearing the proofs; and this motion will therefore be denied.

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MATTER OF M'GARVEY.

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KINGS COUNTY.—HON. ABRAHAM LOTT, SURROGATE.—July, 1887.

MATTER OF MCGARVEY.

*In the matter of the estate of SAMUEL W. WOOLSEY, deceased.*

The exemption from taxation, extended by the "act to tax gifts, legacies," etc. (L. 1885, ch. 483), to a devise or bequest in favor of the "husband of a daughter" is unaffected by the circumstance of the death of the latter occurring before that of the testator, her parent.

IN the proceedings for a judicial settlement of executors' account, Frances W. McGarvey, infant legatee and devisee under the will, filed an objection, showing that the executors had paid a legacy of \$10,000 to Edward McGarvey, widower of a deceased daughter of testator, without deduction of legacy tax, and contending that the executors should be personally charged with, and required to pay the tax with interest.

HENRY MAJOR, *special guardian*.

THE SURROGATE.—I think that the legacy to Edward McGarvey is not subject to the collateral inheritance tax. The statute exempts the husband of a daughter. It is true the wife of McGarvey died before the testator, but I think this does not affect the matter. The legislature may have had in view more than the benefit accruing to the wife of the legatee by this exemption. The children of a deceased daughter may have been considered as favored by the exemption, from this tax, of a legacy to their father.

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MATTER OF JOHNSON.

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KINGS COUNTY.—HON. ABRAHAM LOTT, SUBROGATE.—July, 1887.

## MATTER OF JOHNSON.

*In the matter of the estate of LAURA L. JOHNSON, deceased.*

Where a will makes a bequest to one for life, with remainder over, all the beneficiaries being in the category of those whose interests are subject to the tax imposed by the "collateral inheritance tax" act, L. 1885, ch. 483, the tax on the life estate is to be taken out of the income, and that on the remainder to be deducted from the principal. The fact that the amount of the latter will thus be reduced is no objection, since such reduction is lawfully made.

Where the interest of the life beneficiary is not taxable, the amount of the remainderman's tax is nevertheless lawfully payable out of the principal.

MOTION to confirm report of appraiser appointed in proceedings instituted under "collateral inheritance tax" act.

OLIVER S. ACKLEY, *for executrix, opposed* :

1. The act is impracticable and inoperative, as respects the estates created by this will, no machinery being provided whereby the executrix can properly and safely pay the tax imposed.

2. The will provides: "I give and bequeath to my nephew, J., \$2,000, in trust, to invest, and pay the income to his mother, M., during her natural life, or until she shall re-marry; and, upon her death or re-marriage, I give and bequeath the same absolutely, in equal shares, to the said J., and my grandniece, B."

3. It is essential to compute the value of the estate

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MATTER OF JOHNSON.

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of M., not only for her natural life, but also for the period during which she may remain unmarried ; which is impossible.

4. The amount of the assessed taxes would have to be taken out of the \$2,000 bequeathed. But the deduction of the remaindermen's tax would diminish the amount which M. is entitled to enjoy ; and the deduction of her tax would deprive the remaindermen of their right to receive the unimpaired principal, at her death or marriage.

5. The will bequeaths the residue to the executrix, in trust, for the benefit of two brothers of decedent and their wives, for life, with remainder to nephews and nieces. The appraiser finds these life estates not taxable, and assesses the taxes on the remainders. The deduction of the remaindermen's taxes would diminish the amounts which the particular beneficiaries are entitled to enjoy during their lives.

6. The report should not be confirmed.

**THE SURROGATE.**—The appraiser's report is confirmed. I do not see that the objections made have any force. The principal objection is that the remainders would be diminished by the payment of the tax on the life estate out of the capital.

The answer to this is that the tax on the life estate may and ought to be taken out of the income. The objection that the tax on the remainder will reduce the capital and so affect the income is not, I think, tenable, as long as it is lawfully so reduced. There is no other mode of ascertaining the value of the life estate than that adopted by the appraiser.

KINGS COUNTY.—HON. ABRAHAM LOTT, SURROGATE.—October, 1887.

CROSSMAN v. CROSSMAN.

*In the matter of the estate of HENRY CROSSMAN, deceased.*

The law favors the theory of the vesting of estates created by will, where a question arises as to whether a lapse has occurred.

Decedent's will directed that the executors set apart \$100,000 out of his estate, apply the income to the use of his wife for life, and, "from and after her death, pay over the said sum of \$100,000 to our adopted son, H., if he shall then have arrived at the age of 28 years"; with a provision for the contingencies of (1) the widow's death while H. was under that age, and (2) the son's death under that age, leaving no lawful issue; but none for (3) the event,—which occurred,—of the son's death, at the age of more than 28 years, during the widow's lifetime. In the first event, the ultimate disposition was for the exclusive benefit of the son. Upon an accounting, after the death of H., and during the widow's lifetime,—

*Held*, that the \$100,000 vested in H. on his arrival at the age of 28 years, and passed by his will, subject to the life right of decedent's widow.

*Lane v. Brown*, 20 *Hun*, 382—compared.

UPON a judicial settlement of the account of executors of decedent's will, objections were filed by all the parties whose interests were adverse to the claims of the estate of Henry C. Crossman, a deceased son of the testator.

The will of decedent provided that the executors "do set apart of my estate the sum of \$100,000; and keep the same invested and out at interest, and that they apply the interest or income therefrom to the use of my said wife . . . . during the term of her natural life, and that from and after her death they



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CROSSMAN V. CROSSMAN.

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pay over the said sum of \$100,000 to our adopted son, Henry C. Crossman, if he shall then have arrived at the age of twenty-eight years, but if at the decease of my wife he shall not have arrived at the age of twenty-eight years then my executors are directed to keep the same invested until he shall have arrived at that age, and that they apply the interest or income to his use, and on his arrival at the age of twenty-eight years, the said principal and the accumulated interest (if any) is to be paid to him, but if my said adopted son shall die before he arrives at the age of twenty-eight years, and not leaving lawful issue him surviving, then the said sum of one hundred thousand dollars shall be divided as follows: ”

The residuary clause read thus: “Seventh. All the rest, residue and remainder of my estate, real and personal . . . . I do give, devise and bequeath unto my adopted son, Henry C. Crossman, to be paid over to him when he shall have arrived at the age of twenty-eight years; if my said adopted son shall depart this life without having attained the age of twenty-eight years, and leaving lawful issue him surviving, then my said residuary estate shall be paid over to his issue, but if he shall die under that age and without leaving lawful issue him surviving then the whole income of my said residuary estate shall be applied to the use of my wife for and during her natural life, and upon her decease the principal is to be divided among my next of kin and heirs at law, as if I had died intestate.”

Henry C. Crossman died after attaining the age of twenty-eight years, during the widow's lifetime, and leaving a will.

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CROSSMAN V. CROSSMAN.

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JAMES R. STEERS, JR., *for executors.*

HAROLD VERNON, *for Wm. H. Crossman and others.*

DAILY & BELL, *for E. R. Westphal.*

JAS. A. HUDSON, *for J. F. Macarthy.*

EUGENE SMITH, *special guardian.*

THE SURROGATE.—Henry C. Crossman attained the age of twenty-eight years, and the testator must be deemed to have intended that then the bequest of \$100,000 should vest, although payment was deferred until the death of the testator's widow. We are to encourage, always, a construction which leads to the vesting of legacies, and seek diligently for such purpose and intention (*Smith v. Edwards*, 88 *N. Y.*, 109).

The direction to the executors to pay the \$100,000 to Henry C. Crossman when he arrives at the age of twenty-eight is absolute, save that the executors are to hold that sum, for the purpose of paying the income to the testator's widow during her life; and it is only in the event of the death of Henry under the age of twenty-eight years that others are to take. The legacy to Henry C. Crossman vested upon his attaining the age of twenty-eight years, because the statute declares that future estates are vested where there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate (1 *R. S.*, 723, § 13); and it is further provided that limitations of future or contingent interests in personal property shall be subject to this rule (*id.*, 773, § 2).

Henry C. Crossman, at the age of twenty-eight:

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CROSSMAN V. CROSSMAN.

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years, would have an immediate right to the possession of his legacy, upon the ceasing of the intermediate or precedent estate, unless it is conceded as claimed by the contestants there was no gift of this legacy save in the direction to pay upon the death of the testator's widow, and that, for that reason, vesting was deferred until such event.

The like claim was made in a case where the wording of the will bore a close resemblance to the wording of the will in question but the court denied the construction here contended for by the contestants (*Lane v. Brown*, 20 *Hun*, 382). The cases cited for the contestants mainly arose upon contingent devises and bequests, and deal principally with the statute against perpetuities and with conditions not found in this will. It will be observed that there is no gift over in the event, which has occurred, of Henry dying over twenty-eight years of age during the life of Mrs. Crossman (unless it was to Henry as residuary legatee). It would be unreasonable to suppose that the testator intended to give to the issue of Henry the fund, did Henry die before he was twenty-eight, and yet intend to cut off both him and his issue, if he died after the age of twenty-eight and during the life of testator's widow. The technical rule relied upon by the contestants must give way to the intention of the testator where that sufficiently appears. I also think that, if there was a lapse, Henry would take as residuary legatee.

In respect to the income of the residuary estate the executors properly claim that such income devolved upon Henry C. Crossman, under the Revised Statutes (1 R. S., 726, § 40).

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PROUT V. M'NAB.

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The contestants having no interest in this matter, their objections to the executors' account must be dismissed.

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KINGS COUNTY.—HON. ABRAHAM LOTT, SURROGATE.—November, 1887.

PROUT v. McNAB.

*In the matter of the application for probate of a paper propounded as the will of ROBERT T. PROUT, deceased.*

The decree admitting a will to probate, being evidence, against the parties, of the testator's death, the fact of such death, when controverted, is one of the issues before a Surrogate's court to which an alleged will is presented, and the burden of proof is on the proponent.

The death, in such a case, cannot be proved by repute.

THE petition for probate of the alleged decedent's will, presented by William J. Prout, who was therein nominated executor, set forth, along with other jurisdictional facts, that Robert J. Prout died in London, England, May 29th, 1887, while on a visit there. Angelina Prout, wife of the alleged decedent, appeared as contestant, filing objections, and demanded the examination of petitioner, under Code Civ. Pro., § 2618.

A. C. HOCKEMEYER, for E. P. McNab, daughter; for probate.

GEORGE P. WEBSTER, for Angelina Prout; opposed.

**THE SURROGATE.**—The proponent's position—that the petition is sufficient to give this court jurisdiction—is sound, yet this is jurisdiction only to entertain the proceedings, and adjudicate without proofs in case the petition is not controverted. Here the important allegation of the petition—that the testator is dead—is controverted, and the burden of proof is upon the proponent to prove that fact. That this may be an issue triable in this court is, I think, recognized in *Carroll v. Carroll* (60 *N. Y.*, 121, 123), where MILLER, J., in passing upon the question whether probate proceedings were evidence of the testator's death, referred to certain authorities sustaining the affirmative of the proposition, and said: "This is undoubtedly the true rule, and it will be found, upon examination, that the authorities cited upon this question relate mainly to cases where the right of the administrator or executor to sue is involved, or where the parties were connected with the proceeding, interested in the estate, and had their rights adjudicated upon when the will was established before the probate court."

If, then, the probate proceedings are evidence of the death of the testator, against the parties to the proceedings, it must follow that they have the right to cross-examine witnesses testifying to the fact, and the right to advance counter-proofs.

I do not think the documents from England competent proof, nor could the death of the testator be proven by repute.

It follows, there is not now sufficient proof before me of the death of Robert T. Prout the alleged testator.

KINGS COUNTY.—HON. ABRAHAM LOTT, SURROGATE.—December, 1887.

CHURCH CHARITY FOUNDATION v. PEOPLE.

*In the matter of the estate of MARIA HUNTER, deceased.*

The expression "societies, corporations and institutions now exempted by law from taxation," contained in L. 1885, ch. 483 (as amended in 1887), implies an immunity from taxation, expressly granted by statute, and not a mere omission to tax.

Those societies, corporations and institutions are to be deemed "exempted by law from taxation," within the meaning of the act cited, *whose property* is so exempted.

A corporation organized to establish and maintain (1) houses for the maintenance of indigent aged persons and the support and education of destitute children, and (2) hospitals and dispensaries for the shelter and relief of the infirm, sick and needy, which is maintained by voluntary gifts, has no capital stock, and carries on no business,—is exempt, as legatee, from the "collateral inheritance tax," being protected as, in effect, an alms-house, poor-house, school-house, or combination thereof, by chapter xiii. of part 1st of the Revised Statutes, treating "of the assessment and collection of taxes."

APPLICATION of John W. Hunter and George KISSAM, executors of decedent's will, for an order assessing and fixing the amounts of tax due from beneficiaries, pursuant to L. 1885, ch. 483. The essential facts are stated in the opinion.

J. L. MARCELLUS, *for executors.*

W. H. WARING, *for Church Charity Foundation.*

THE SURROGATE.—The will of Maria Hunter (who died in the month of October, 1886) gave a legacy of

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CHURCH CHARITY FOUNDATION V. PEOPLE.

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\$5,000 to "The Church Charity Foundation of Long Island," and an application was made by her executors to have it determined whether said legacy is subject to taxation under chapter 483 of the laws of 1885.

It appeared that "The Church Charity Foundation of Long Island" is a corporation incorporated to establish and maintain one or more houses for such indigent aged persons and indigent orphan and half orphan children and other children left destitute, as it may receive under its care, and to educate such children, and to establish and maintain one or more hospitals, dispensaries or other institutions for the shelter, support and relief of sick, infirm and indigent persons; that the property of said corporation has been and is being used for such purposes; that said corporation is a charitable institution and is supported by voluntary gifts and the income from its property; that the real property on which its buildings are placed is not taxed; that it is not a moneyed or stock corporation; that it carries on no business; that it has no capital stock; that it earns no dividends, declares no dividends and has never had any stock or made any dividends.

Section 1 of chapter 483, laws of 1885, expressly excludes from taxation under the provisions of that act legacies which shall be given to "societies, corporations and institutions now exempted by law from taxation."

The only corporations which *as corporations* are specifically made liable to taxation under the laws of the State of New York, are moneyed or stock corporations, and the Church Charity Foundation is not such a corporation, and therefore is not specifically made

liable to taxation under any of the laws of this State prior to this act of 1885. But the language used by this act of 1885, excludes from taxation legacies to corporations "*now exempted by law* from taxation." This language I think shows that the intention of the legislature was to exclude from taxation under this act such corporations as by some specific provisions of law are *exempted* from taxation, or whose property by some specific provisions of law is *exempted* from taxation. The language "exempted by law from taxation" looks to some actual provision of the law, not to the mere absence of any provision, and it cannot be argued that because the law does not specifically tax a corporation, therefore that corporation is "*exempted by law* from taxation." "Exempt" is defined by Burrill to mean, "to relieve from some requisition, etc., to which others are subject."

There are no corporations which by specific provisions of law are "exempted by law from taxation," but the property of certain corporations is by specific provisions of law "exempted" from taxation, and I am of the opinion that the "societies, corporations and institutions now exempted by law from taxation," referred to in the first section of chapter 483 of the laws of 1885, are the societies, corporations and institutions whose property is exempted by law from taxation.

Under the laws of this State, all lands and all personal estate within this State, whether owned by individuals or by corporations, is liable to taxation, subject to certain exemptions (R. S., part 1, ch. 13, tit. 1, § 1). The exemption specified in the laws, so



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CHURCH CHARITY FOUNDATION V. PEOPLE.

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far as they affect the Church Charity Foundation, are buildings for colleges, academies or other seminaries of learning, school-houses and the lots whereon they are situated, poor-houses, alms-houses, houses of industry and the real and personal property used for such purposes belonging to or connected with the same (id., § 4, subd. 3, 4); all stocks belonging to charitable institutions (id., § 4, subd. 6); the personal estate of every incorporated company not made liable to taxation on its capital in R. S., part 1, ch. 13, tit. 4.

As the fourth title of chapter 13, part 1, R. S., provides for the taxation of moneyed or stock corporations only, and as the Church Charity Foundation cannot be classed as such, it is clear that its personal estate is exempted by law from taxation. As the buildings owned by the Church Charity Foundation are used for the care, maintenance, education and support of aged indigent persons, and indigent orphans and half orphan children and other children left in a destitute and unprotected state and condition, such buildings may properly be classed as alms-houses, or poor-houses, or school-houses, or houses of industry, all of which are exempted by law from taxation.

In *Hebrew Asylum v. The Mayor* (11 *Hun*, 116), the court say at page 118: "With the other buildings owned by the society, it was used for the custody, education and employment of dependent, destitute and friendless children, and it was maintained for the same general purpose as poor-houses and alms-houses, all of which are declared to be exempt from taxation." In that case the corporation was of a character similar in its purposes to the Church Charity Foundation. In

TAYLOR V. PUBLIC ADMINISTRATOR.

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Ass'n., etc. v. The Mayor (38 *Hun*, 593), the corporation was organized to provide and maintain a place of refuge for colored orphans where they shall be boarded, clothed and educated till fit to be bound out, and the court held that its building was a school-house and therefore exempt.

As the real and personal property of the Church Charity Foundation is specifically exempted by law from taxation, I am of the opinion that it is one of the corporations "now exempted by law from taxation" referred to in section 1 of chapter 483 of the laws of 1885, and that the legacy of \$5,000 given to said corporation by the will of Maria Hunter is not subject to taxation under said chapter.

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KINGS COUNTY.—HON. ABRAHAM LOTT, SURROGATE.—January, 1888.

TAYLOR v. PUBLIC ADMINISTRATOR.

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*In the matter of the estate of CHARLES S. TAYLOR, deceased.*

Under L. 1871, ch. 335, creating the office of public administrator in Kings county (as amended by L. 1882, ch. 124), and giving to that officer prior right to administer an intestate's estate, "whenever such person shall die leaving any assets or effects" in the county, and there shall be no widow, husband or next of kin, etc., the requirement of the existence of property in the county applies only to decedents who, at the time of their death, *did not reside* within the State of New York;—all the "assets or effects" of the estate of a decedent, who, at the time of his death, *was a resident* of the State, being deemed to be located within the county of his latest residence.

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TAYLOR V. PUBLIC ADMINISTRATOR.

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APPLICATIONS for letters of administration of decedent's estate. The facts are stated in the opinion.

CHARLES H. OTIS, *for public administrator.*

ALBERT G. McDONALD, *for next of kin.*

THE SURROGATE.—This is an application for letters of administration of the goods, chattels and credits of one Charles Sherman Taylor, deceased. The application was made by a creditor of said deceased, and the public administrator in Kings county was cited upon such application. Upon the return day of the citation, one Harry P. Taylor, a son and sole next of kin of said intestate, filed his petition in this court, praying that letters of administration issue to him. The dispute herein lies between said Harry P. Taylor and the public administrator, each of whom claims to have the prior right to letters of administration.

The facts conferring jurisdiction upon this court to grant letters of administration to either of said applicants are as follows: Said Charles Sherman Taylor, the intestate, was, at the time of his decease, a resident of the county of Kings. He left him surviving no widow, and as his only next of kin his said son Harry P. Taylor, who is not a resident of the State of New York. The property of intestate consisted of certain bonds, stocks and other securities of the value of about twelve thousand dollars (\$12,000), which at the time of his decease, and at the time of the application herein, were still in a box in a Safe Deposit company of the city of New York, where they had been placed by the intestate in his lifetime.

By chapter 335 of the laws of 1871, creating the office of public administrator in Kings county, and conferring authority upon him to act as administrator in certain cases, as amended by chapter 124 of the laws of 1882, it is provided:

"Such public administrator shall have the prior right and authority to administer upon the goods, chattels, personal estate and debts of persons dying intestate, in the following cases:

"1. Whenever such person shall die leaving any assets or effects in the county of Kings, and there shall be no widow, husband or next of kin, entitled to have distributive share in the estate of said intestate, resident in the State, entitled, competent or willing to take out letters of administration on such estate."

It is contended by counsel for the non-resident next of kin of intestate, that it is not only necessary that there should not be any next of kin resident in the State, but also that there should be some assets or effects physically present within the territory of the county of Kings, at the time the application for administration is made, in order to confer jurisdiction upon the Surrogate's court to grant letters of administration to the public administrator. I do not agree with counsel in this contention.

There are two different sets of circumstances under which the Surrogate of a county has either exclusive jurisdiction, or jurisdiction co-ordinate with the Surrogates' courts of other counties, until such time as letters have been actually granted and issued by some one Surrogate's court within the State.

In the first place, whenever an intestate was, at the

time of his decease, a resident of the State of New York, it is the Surrogate of the county in which such intestate resided at the time of his decease who has exclusive jurisdiction to grant letters of administration, without reference to the location of assets within the State; and in such case, the rule of law is elementary that the location of all assets within the State, of every character and description, for the purposes of administration, is in the county in which the intestate resided at the time of his decease.

In the second place, wherever a person dies intestate who is a non-resident of the State, but leaving assets within the State, then it is the location of assets within the State which determines the jurisdiction of the Surrogate's court to grant ancillary letters of administration; and the Surrogate's court which first grants letters of administration is the one which acquires jurisdiction for the entire State.

It seem to me entirely clear that the provision in the public administrator's act, providing that the person dying must leave assets or effects in the county of Kings in order to confer jurisdiction upon this court to grant letters of administration to the public administrator, relates exclusively to the case in which such deceased person is a non-resident of the State. If the deceased person, upon whose estate administration is applied for, is a resident of the State, then the location of his personal assets of all kinds within the State is the county in which such deceased person resided at the time of his decease.

Letters of administration will be granted to the public administrator.

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MATTER OF VOORHEES.

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KINGS COUNTY.—HON. ABRAHAM LOTT, SURROGATE.—February, 1888.

MATTER OF VOORHEES.

*In the matter of the probate of the will of JOHN A. VOORHEES, deceased.*

The fact that an interlineation, in the body of a will, is not noted at the foot of the instrument, does not exclude the theory of its having been made before execution, where other reasons exist for reaching that conclusion.

Among interlineations in wills, are to be distinguished those which supply a blank in the sense, and those which indicate a change of intention on the part of the testator. The latter, only, are subject to the strict presumption of having been effected after execution.

The will of testator, who died leaving, him surviving, two sons and three daughters, after certain bequests to grandchildren, provided: "I give unto my son Abraham and his heirs one equal fifth share of my real and personal estate; also Johana Jewell and heirs wife of Ditmas Jewell one fifth share of my real and personal also my son Wm. K. Voorhees and his heirs, one fifth share of my real and personal estate I give unto my daughter <sup>Adriana</sup> and her heirs one fifth of my real and personal estate; also Anna Maria Hegeman, wife of John J. Hegeman and heirs one fifth share real and personal estate." The interlineation was not noted at the foot of the will, which was in the handwriting of testator.—

*Held*, that the will should be admitted to probate, with the interlineation as a constituent part thereof.

CONTEST as to true reading of decedent's will, on application for probate. The facts are stated in the opinion.

WM. J. GAYNOR, *for executors.*

EDGAR BERGEN, *for contestant.*

JOHN. H. KEMBLE, *spectal guardian.*

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MATTER OF VOORHEES.

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**THE SURROGATE.**—The testator had two sons and three daughters and by his will he devised one fifth of his estate to each them, naming them successively:

In the clause making provision for his daughter Adriana, her name is interlined, and it is claimed on behalf of one of the next of kin that the presumption of law is that this interlineation was made after the execution of the will. The testator having named two of his daughters in his will, it is a fair presumption that in the clause in question he intended to name the remaining daughter, at any rate he intended to name one of his daughters, and finding he had not done so, he interlined the name. The entire will, including the interlineation, is in the handwriting of the testator; the whole appears to have been written at the same time and with the same pen and ink. In supplying this name the testator did not revoke any part of his will or make any new devise or bequest, but simply supplied a blank or mere clerical omission. This should not be confounded with the case of interlineations which revoke some part of a will or add new and independent provisions.

In Jarman on Wills (vol. 1, p. 144), it is said: "Where a will has been drawn with blanks left for the names of legatees and the amounts of the legacies, which blanks are afterwards filled up, but there is no evidence to show when, the presumption is the blanks were filled in before execution, and although there may have been no blanks but the names of the legatees are found interlined, yet if the interlineation only supplies a blank in the sense, and appears to have been written with the same ink and at the same

time as the rest of the will, the court will conclude that it was written before execution."

As I have said, the testator had three daughters; then his reference to a daughter without naming her left a blank "in the sense" before mentioned, and so the presumption is that the blank was filled up before the execution of the will.

I have fully considered the cases cited for the contestant. In *Wetmore v. Carryl* (5 *Redf.*, 544), a legacy of \$5,000 was changed to one of \$2,000, and it is sufficient to say that in each case there was by the alteration or interlineation a change of intention on the part of the testator indicated.

In *Crossman v. Crossman* (95 *N. F.*, 145, 153), Judge EARL, in delivering the opinion of the court, said: "Here, from all the circumstances, it was at least for the Surrogate to determine whether this interlineation was made before or after execution, and in making that determination he was bound to consider the handwriting, the color of the ink, the manner of the interlineation, the fact that it was noted at the bottom of the instrument, and that it was made to correspond with the duplicate. Where an interlineation or erasure in a will is fair upon its face and it is entirely unexplained, there being no circumstance whatever to cast suspicion upon it, it would not be proper for any court to hold that the alteration was made after execution."

It is true there was no note of the interlineation in the instrument in question, but I do not think the court in the case last cited considered that an essential circumstance, other reasons existing for reaching the



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MATTER OF BROOKS.

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same conclusion. That the interlineation is fair upon the face of the will I do not doubt. It was in the handwriting of the testator and rendered effective a part of his will containing the only provision for one of his children.

The will must be admitted to probate as now written.

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KINGS COUNTY.—HON. ABRAHAM LOTT, SURROGATE.—February, 1888.

## MATTER OF BROOKS.

*In the matter of the estate of SUSAN A. BROOKS, deceased.*

The act, L. 1887, ch. 713, amending the "collateral inheritance tax" act (L. 1885, ch. 433) is not retroactive so as to govern, in the assessment and collection of a tax on interests passing under the will of a decedent dying before it took effect.

ASSESSMENT of "collateral inheritance tax." The facts are stated in the opinion.

JAS. W. RIDGWAY, *for county treasurer.*

RUFUS M. WILLIAMS, *for executor.*

THE SURROGATE.—The deceased died in January, 1886, and therefore the act, chapter 433 of the Laws of 1885, and not the act chapter 713, Laws of 1887, applies to the taxation of her estate. In my opinion the latter act was not intended to be retroactive.

## FIGUEIRA V. TAAFE.

There is no question but that under the act of 1885, the tax was due immediately after the death of the testatrix (see secs. 2 and 4). The share of the children of the deceased brother of the testatrix is subject to the inheritance tax. To hold that they took through their father would be to defeat their claim to any portion of the estate. Their father having died before the testatrix, the legacy to him would have lapsed (*Van Beuren v. Dash*, 30 *N. Y.*, 393). Therefore, they must claim directly from the testatrix.

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KINGS COUNTY.—HON. ABRAHAM LOTT, SURROGATE.—April, 1888.

FIGUEIRA v. TAAFE.

*In the matter of the probate of the will of MARY HOLLOHAN, deceased.*

The solitary circumstance of the existence of the relation of confidant and spiritual adviser, between a testator and the chief beneficiary under his will, is insufficient to create a presumption of fraud or undue influence.

Decedent, an unmarried woman, who died at St. Mary's Hospital, Brooklyn, five days before her death executed the will propounded, whereby she disinherited her sisters, and disposed of the bulk of her estate as follows: "All the rest, residue and remainder of my estate of every name and kind I hereby give, devise and bequeath unto my said executor, Rev. T—."

It was not pretended that decedent was mentally incompetent, nor that there was direct evidence of undue influence on the part of T., who was her adviser in spiritual affairs. It appeared that decedent had expressed an intention to omit her sisters from the number of her

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beneficiaries, and had spoken of making dispositions in favor of certain charities by her mentioned, which however, she failed to do.—  
*Held*, that undue influence would not be presumed; that the provisions of the residuary clause were valid; and that T. took thereunder absolutely, for his own benefit.

APPLICATION, by Thomas Taafe, for probate of decedent's will; opposed by Ellen Figueira and another, next of kin. The facts are stated in the opinion.

McGUIRE & KUHN, *for proponent*,

MORRIS & PEARSALL, *for contestants*.

THE SURROGATE.—The testatrix died April 23d, 1887, at St. Mary's Hospital, Brooklyn, where, five days before her death, she executed her will. It is not contended that the testatrix was mentally incompetent to execute a will, nor could it be, in view of the testimony as to the acts and conduct of the testatrix before and after the execution of the will.

The residuary clause of the will is the principal point attacked by the contestants, the sisters of the testatrix. That clause reads as follows:

"*Fourth*. All the rest, residue and remainder of my estate of every name and kind I hereby give devise and bequeath unto my said executor Rev. Thomas Taafe."

It is claimed that this is not an absolute gift to Rev. Thomas Taafe individually, but unto him as executor, or, in other words, to him officially and not beneficially; and many authorities are cited to sustain this contention, but they fall short of justifying the construction claimed. In my opinion, the words "my

said executor," preceding the name of the residuary legatee, are to be regarded as simply descriptive of the person.

It is further claimed, for the contestants, that the will was procured by undue influence on the part of the residuary legatee. There is not the slightest evidence of this, nor is it claimed there is any. It is, however, sought to be inferred from the confidential relation which the legatee held to the testatrix as her spiritual adviser. "Undue influence, which is a species of fraud, when relied upon to annul a transaction *inter partes*, or a testamentary disposition, must be proved, and cannot be presumed" (Matter of Smith, 95 *N. Y.*, 516-522). This was said in a case where it was claimed, that the fact that the beneficiary was the attorney of the decedent, alone, created a presumption that a testamentary gift was procured by fraud or undue influence. The court ruled to the contrary. See, also, Matter of Martin (98 *N. Y.*, 193).

In this case, the testatrix had independent advice concerning her testamentary dispositions, and I do not believe that the reputable counsel who, in the absence of the legatee, received instructions as to this will from the testatrix, was a party to any imposition or coercion to procure its execution. Father Taafe called on the testatrix at her request. She had previously declared her intention to disinherit her sisters. That she did not dispose of her property to certain charities mentioned by her may indicate either a change of intention or an idea that Father Taafe would himself use his legacy in aid of those charities,

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SCHWARTZ V. BRUDER.

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but there is no evidence that he agreed to do so. I do not think that any inference can be drawn from Mr. Pladwell's not being consulted professionally as to the will. He does not appear to have acted as the legal adviser of the testatrix, except in drawing some papers shortly before her death, and then he was introduced by Mr. Ferry who had acted as her agent in selling some real estate. The will is admitted to probate.

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KINGS COUNTY.—HON. ABRAHAM LOTT, SUBROGATE.—June, 1888.

SCHWARTZ v. BRUDER.

*In the matter of the probate of the will of ANNA E. SCHWARTZ, deceased.*

The following provision in a will: "I hereby direct that my executor hereinafter named to have masses read for the repose of my soul for which I direct him to expend the sum of five hundred dollars,"—

*Held, void.*

*Holland v. Alcock, 108 N. Y., 312—followed.*

CONSTRUCTION of decedent's will, upon application, by Joseph Bruder, therein nominated sole executor, for a decree admitting the same to probate. John Schwartz and another, next of kin of decedent, appeared as contestants.

HENRY FUEHRER, *for petitioner:*

THE testatrix had a right to provide in her will that

a reasonable amount should be expended by the executors for masses for the repose of the soul.

The amount directed to be expended for that purpose does not exceed the amount limited by statute which can be bequeathed to religious societies (the estate being something over \$3,000), nor will the person who objects to that clause of the will be benefited by the invalidation of that part of the will.

In judging of this part of the will the Surrogate has a right to take into consideration all the circumstances of the case, the fact that decedent left no children, that the estate is amply sufficient and that there is not a particle of evidence on the part of the contestant, that the provision of the will in question is an *improper* one.

EDWARD P. SCHELL, *for next of kin* :

THE direction for masses is void. The case at bar is stronger than that of *Holland v. Alcock* (108 *N. Y.*, 312), for, in that case, there was a direction that the "masses should be offered in a Roman Catholic church to be selected by the executors"; while here no beneficiary of any kind is named; no defined or ascertainable living person, or even corporation, has or ever can have any temporal interest in the bequest; and the court says that even if a specified church had been named, a different question would arise. Cites, also, *Gilman v. McArdle* (99 *N. Y.*, 451); *Power v. Cassidy* (79 *id.*, 602); *Prichard v. Thompson* (95 *id.*, 76).

THE SURROGATE.—In this proceeding I am required to pass upon the validity of the following clause of

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KISSAM v. PEOPLE.

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the will of decedent: "I hereby direct that my executor hereinafter named to have masses read for the repose of my soul for which I direct him to expend the sum of five hundred dollars." I am constrained by the decision of the Court of Appeals in the case of *Holland v. Alcock* (108 *N. Y.*, 312) to determine this disposition to be invalid.

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KINGS COUNTY.—HON. ABRAHAM LOTT, SURROGATE.—July, 1888.

## KISSAM v. PEOPLE.

*In the matter of the estate of DANIEL T. KISSAM, deceased.*

As to whether any tax, upon the passing of property under the will of a decedent dying before the date of the passage of the act, L. 1887, ch. 713, can be collected in proceedings instituted after that date—*quære.*

*Matter of Miller*, 47 *Hun*, 394; *Nash v. White's Bank of Buffalo*, 105 *N. Y.*, 243—compared.

THE district attorney of Kings county, on February 15th, 1888, filed a petition setting forth that decedent died October 24th, 1886, leaving an estate exceeding \$500 in value, and leaving, him surviving, no father, mother, wife, children, brother, sister, lineal descendants, wife or widow of a son, or husband of a daughter, having any interest under his will; and praying for a citation to Susan M. Kissam, the execu-

## KISSAM V. PEOPLE.

trix, to show cause why the property passing by the will should not be valued, and the tax thereon paid pursuant to L. 1885, ch. 483.

The executrix interposed a preliminary objection, that no part of the estate of decedent was liable to said tax, upon the ground that the act of 1885 had been repealed by the act L. 1887, ch. 713, amending the original act, and that "there is now no law under which the tax imposed by the act of 1885 can be collected, the said Daniel T. Kissam, having died in the latter part of the year 1886, and prior to the time when the amendatory act took effect"; and asked that the proceedings be dismissed.

JAS. W. RIDGWAY, *district attorney, petitioner.*

GERRITSEN & EASTMAN, *for executrix:*

Cited *Nash v. White's Bank of Buffalo* (105 *N. Y.*, 243; below, 37 *Hun*, 57); *Ely v. Holton* (15 *N. Y.*, 595); *Moore v. Mausert* (49 *N. Y.*, 332); *Calhoun v. R. R. Co.* (28 *Hun*, 379): distinguishing *Matter of Miller* (47 *Hun*, 394).

THE SURROGATE.—The General Term of the Supreme court in this Department has recently held, in the *Matter of Miller* (47 *Hun*, 394), that the operation of the act of 1887, amending the collateral inheritance act of 1885, by exempting devises and bequests to an adopted child from taxation under that act, did not affect liability for a tax which had been directed to be paid by an order of the Surrogate, under the law of 1885, prior to the passage of the amendment of 1887.



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If the decision of the Supreme court rests upon the ground of the Surrogate's order, and a setting apart of the tax, it does not apply to this case. If the order is not the basis of the decision, then it seems to conflict with the decision of the Court of Appeals in the case of *Nash v. White's Bank of Buffalo* (105 *N. Y.*, 243). On the strength of the Court of Appeals case, the Surrogate of Niagara county has recently decided that the effect of the act of 1887 was to defeat the collection of a tax, under the act of 1885, due before the passage of the act of 1887, on a bequest to an adopted child.

I shall, for the present, overrule the objection of the executor in this case, and deny the motion to dismiss this proceeding, but as I understand, the Attorney General has directed the District Attorney of Niagara county to appeal from the last mentioned decision, I think proceedings in this matter should be stayed, pending the determination of that appeal.

Objection overruled, and motion to dismiss denied.

KINGS COUNTY.—HON. ABRAHAM LOTT, SURROGATE.—July, 1888.

FRAZER v. PEOPLE.

*In the matter of the estate of SUSAN F. FROWE, deceased.*

*It seems*, to be primarily the duty of an executor to apply for an appraisal of interests passing by the will of his decedent, taxable under the "collateral inheritance tax" act. The power given to the Surrogate, of his own motion to cause an appraisal to be made, and to fix the tax, was not intended to relieve personal representatives of this obligation.

Four days before the expiration of the period of eighteen months after the death of testatrix, who died November 27th, 1886, the executors paid the "collateral inheritance tax," assessed upon a life estate and remainders, passing under the will. About a month before such payment, the district attorney instituted proceedings to compel such payment.—*Held*,

1. That, there having been no "refusal or neglect" to pay the tax, within the meaning of L. 1887, ch. 713, § 17, costs should not be awarded against the executors.
2. That there was probable cause for instituting the proceedings, and the district attorney was entitled to a certificate under id., § 19.

APPLICATION for costs of proceedings on assessment of "collateral inheritance" tax. The facts appear from the brief and opinion.

JAS. W. RIDGWAY, *district attorney, for the application.*

JACKSON & BURR, *for Jennie Frazer and another, executrices, opposed:*

The testatrix died November 27th, 1886. Her entire estate was personal in character. By her will, a

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FRAZER V. PEOPLE.

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life estate was created therein, for the benefit of her brother (who died before the testatrix) with a succeeding life estate, after his death, to her sister-in-law, Elizebeth Frazer, and, upon the termination of the second life estate, there was a remainder over, given to her two nieces. No order was made, assessing the estate for the purpose of taxation, as required in the case of an outstanding life estate, until May 27th, 1888. On May 23d, 1888, and within eighteen months after the death of the testatrix, the tax was paid. Prior to that, and on April 17th, 1888, proceedings were taken by the district attorney to compel the payment of the tax. The matter was adjourned by consent until this day, and the sole question in the case now is, whether the proceedings were prematurely taken, so that the estate is subject to the payment of costs.

1. This tax did not become due and payable until May 17th, 1888. By § 4 of the act of 1887, in effect the same as the similar section of the act of 1885, it is provided as follows: "All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent." By § 2 of the act of 1887, of like effect with a similar section of the act of 1885, where there is an outstanding life estate with a remainder over, the Surrogate shall "assess and determine the value of the estate . . . . subject to the tax." By § 13 of the act of 1887, it is provided, that this determination shall be made by an appraiser who may be appointed by the Surrogate, either upon his own motion, or upon the application of any interested party. But it is further provided that, in

the case of an outstanding life estate with a remainder over, the tax in question shall NOT be due and payable until after the Surrogate, upon the report of the appraiser, has assessed and determined the value of the estate for the purpose of taxation. In this case, that order was not made until May 17th, 1888, and under § 17, the treasurer or comptroller could not notify the district attorney until that date. It is not pretended that such notification has been given since that time.

2. Although it is perfectly clear that, where there is an outstanding life estate, as in the case at bar, the tax is not due and payable until after the Surrogate has assessed and determined the value of the respective estates, we think that in no case can proceedings be instituted by the district attorney until the expiration of eighteen months from the death of the testator. Although, by § 4, the tax imposed by this act is due and payable at the death of the decedent, yet the executor is given eighteen months in which to pay the same without interest. By § 16, the Surrogate cannot issue a citation in this matter unless it shall appear that the tax has not been paid according to law; but inasmuch as, although the law makes the tax due at the death of the testator, yet the law also gives the executor eighteen months in which to discharge the debt, it cannot be said that the tax has not been paid according to law until after the expiration of that time. Further than that, § 17 of the same act provides, that the district attorney shall be notified after the refusal or neglect of the person interested in the property, liable to said tax, to pay the same. It would be a

contradiction in terms to say that a party had refused and neglected to do an act until the expiration of the time given him by law within which to do the act.

3. There is nothing in the act which makes the costs a matter of right, and it follows, therefore, that they can only be awarded by the decree in the discretion of the Surrogate, and we believe that the Surrogate in the exercise of that discretion would not impose costs until after the expiration of eighteen months, coupled with a neglect and a refusal at that time to pay the tax. The proceedings should be dismissed as prematurely taken, but inasmuch as the question is a new one, we consent that it be without costs.

**THE SURROGATE.**—The testator died November 27th, 1886, leaving personal estate subject to the tax imposed by chapter 483, Laws of 1885. By the will of decedent, an estate for life in all the property of the testatrix was bequeathed to Elizabeth F. Fraser, with remainder to certain legatees. On April 17th, 1888, the tax remained unpaid, and, on the application of the district attorney of Kings county, a citation was issued, requiring the personal representatives of the decedent to show cause why the value of the property subject to said tax should not be fixed and ascertained, and to show cause why said tax should not be paid.

It is claimed, in opposition to that application, that "no order was made, assessing the estate for the purpose of taxation, as required in the case of an outstanding life estate, until May 17th, 1888. On May 23d, 1888, and within eighteen months after the death of

the testatrix, the tax was paid. Prior to that, as has been stated, a citation had been issued on the application of the district attorney, and the service thereof made; and the sole question in the case now is—Is the estate liable for the costs in this matter? or, in other words, whether these proceedings were prematurely taken.

It is claimed, for the personal representatives of the decedent, that, until the Surrogate, upon the report of the appraiser, has assessed and determined the value of the estate for the purpose of taxation, pursuant to § 13 of chapter 713, Laws of 1887, the tax is not due and payable; and, the appraisement not having been made until after these proceedings were instituted, no default had been made. The answer to this is that it is primarily the duty of the executor to apply for such appraisement, so that he may ascertain and pay the tax. The power given to the Surrogate, of his own motion to cause appraisement to be made and to fix the tax, was not intended to relieve the personal representatives from their duty in the matter.

I think that § 4 of the act of 1887, read with its other provisions, indicates the intention to be, that, while the tax is due and payable from the death of the decedent for some purposes,—among others that proceedings may be had to appraise and ascertain the value of the estate subject to the tax, and the amount of the tax, and that interest may be charged from the death of decedent in case the tax is not paid within eighteen months thereafter,—yet, as the section referred to provides that, if the tax is paid within eighteen months no interest shall be charged and collected

thereon, it would seem that no proceedings can be instituted to enforce the payment of the tax within the eighteen months. See the matter of the estate of Mrs. Astor (20 *Abb. N. C.*, 405-415). It was intended, I believe, to enable the representatives of the decedent, under many contingencies which may arise in the settlement of the estate, to ascertain the amount of the tax, and for that purpose time may be necessary, to determine the indebtedness of the decedent, and the like.

It is claimed by the district attorney that the citation in this matter is to show cause "why the tax should not be ascertained," as well as why it should not be paid. That is so; but I do not think costs may be awarded except "after the refusal or neglect of the persons interested in the property liable to said tax to pay the same." Laws 1887, ch. 713, § 17.

For the reasons I have stated, this matter is dismissed without costs to either party. The question appears to be new. No authority in point has been cited by either party. I think there was probable cause for citation and taking this proceeding, and will give a certificate to that effect upon request. See Laws 1887, ch. 713, § 19.

Matter dismissed.

NEDER V. ZIMMER.

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KINGS COUNTY.—HON. ABRAHAM LOTT, SURROGATE.—July, 1888.

NEDER v. ZIMMER.

*In the matter of the estate of MARGARETHA DUBERNELL, deceased.*

In order that an infant legatee, to whom the testator stood in *loco parentis*, be deemed entitled to interest from the death of the latter, it is sufficient that no other provision nor any maintenance, in the meantime, is allotted by the will. That the infant has extraneous means of support is immaterial.

PETITION for a citation to executor to procure judicial settlement of his account. The facts appear in the opinion.

HENRY FUEHRER, for petitioner :

Petitioner is entitled to interest on the money bequeathed to him from the time the money was deposited until the time the money was paid to petitioner. There was a specific sum of money, to wit \$2,500, on deposit in the savings bank, which the testatrix, by the will, directed the executor to pay in equal shares to three children (one of them the petitioner) upon their attaining the age of twenty-one years, respectively. Petitioner claims that he is entitled to the interest accrued upon his share of this money during his minority from the death of the testatrix.

A bequest of a specific legacy will carry any accessions by way of increase or interest which shall accrue



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after the decease of the testator (*Cogswell v. Cogswell*, 2 *Edw. Ch.*, 231; *Clarkson v. Clarkson*, 18 *Barb.*, 646). See also *King v. Talbot* (40 *N. Y.*, 76).

Where the legacy is to a child for whom the parent has made no other provision by his will, and the legacy is made payable at a future day, it carries interest in the meanwhile (*Lupton v. Lupton*, 2 *Johns. Ch.*, 614; *Miller v. Philip*, 5 *Paige*, 573). See also *Brown v. Knapp* (79 *N. Y.*, 136), where the same principle is laid down.

JACKSON & BURB, for executor:

1. The general rule is that legacies only draw interest from the time that they are payable, when there is no direction as to the interest. It is true that there is an exception to this rule in the case of a legacy to a child, payable when it attains its majority and *it has no other means of support in the meantime* (*Brown v. Knapp*, 79 *N. Y.*, 136). But the proof supplied in that case is wanting in this. In that case the court found that the plaintiff had no property except that given him in the will of his grandfather (p. 141). For anything that appears here, the petitioner may have had abundant means.

2. In any event the interest must be very small. It appears that the executor has paid \$850, an excess of \$16.67 over the face of his legacy. There is no proof as to when he came of age, but we presume this is the interest on the face of the legacy from the date of his majority to the date of payment in 1885. The testatrix died in 1881. The executor had certainly one year to pay it without interest. The amount

remaining in the savings bank only drew 3 per cent. or 4 per cent. interest. At 4 per cent., the unpaid interest would only amount to about \$80. The executor, if ordered to account, will file a petition for a voluntary accounting, and bring in all the parties, but he does not wish to do so, until the other children come of age, and he can settle the whole estate. As the granting of this application is in the *discretion* of the Surrogate, substantial justice would be done, if this application were denied with leave to renew on further papers, if the executor does not promptly move for a final accounting when the other children attain majority.

THE SURROGATE.—The bequest in this matter is contained in the fourth clause of decedent's will, and reads as follows: "I give and bequeath the sum of twenty-five hundred dollars which is deposited by me partly in the German Savings Bank corner Broadway and Boerum street in the City of Brooklyn, E. D., and partly in the Savings Institution No. three (3) Chambers street, city of New York, to my three children issued with my first husband John Neder, namely: John, Joseph and Sebastian Neder, for to have the same divided among them in equal share and share alike, but any of those three John, Joseph and Sebastian Neder by having arrived the age of twenty-one years shall drawn his share out of said Twenty five hundred dollars."

This is an application by John Neder, one of said legatees, who was a minor at the death of the testatrix, to compel an accounting by the executor based

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NEDER V. ZIMMER.

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upon a claim that interest has not been paid from the death of testatrix or the time it was of deposit. It appears that his share of the principal has been paid and that he is now of age.

The petitioner to sustain the claim for interest contends that the legacy is specific. It does not appear that the precise sum of twenty-five hundred dollars was on deposit in the banks named, but whether the legacy is specific or simply demonstrative, I think the petitioner is entitled to the interest claimed and so interested sufficiently to maintain this proceeding. It is stated, in the opinion of the court in *Brown v. Knapp* (79 *N. Y.*, 136-141): "When there is a legacy to a minor child or to an infant as to whom the testator is *in loco parentis*, and such legatee has no other provision nor any maintenance in the meantime *allotted by the will*, the legacy although payable at a future day carries interest from the death of the testator."

This authority leads to my holding that the petitioner is entitled to interest from the date of testatrix' death and so entitled to an account.

It will be observed that it is not, as claimed by the executor, essential that the infant legatee has no other property upon which he can be maintained. It is sufficient that there is no other provision nor any maintenance in the meantime allotted by the will.

The executor should account.

## 184 CASES IN THE SURROGATES' COURTS.

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### MATTER OF INGERSOLL.

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ALLEGANY COUNTY.—HON. CLARENCE A. FARNUM,  
SURROGATE.—February, 1888.

#### MATTER OF INGERSOLL.

*In the matter of the estate of JOHN INGERSOLL, deceased.*

An executor or administrator cannot charge for the use of his own horse and wagon, employed by him in collecting the assets of his decedent's estate; although his bill for livery expenses, when reasonable in amount, and necessarily incurred in the administration, will be allowed.

*Pullman v. Willets*, 4 *Dem.*, 536—followed.

An executor or administrator may, where peculiar circumstances render such employment suitable, be allowed credit for disbursements representing moneys paid to an agent employed to collect debts, even though the debts prove bad.

But where a resident executor voluntarily removed from the State before completing his administration, and employed an agent to perform the unfinished business, the performance of which by himself was rendered impossible by his absence,—

*Held*, that the executor must pay out of his own pocket for the services of the agent, and could not be remunerated, out of the estate, for traveling expenses incurred in returning to the State.

*McWhorter v. Benson*, *Hopk. Ch.*, 28; *Cairns v. Chaubert*, 9 *Paige*, 160; *Everts v. Everts*, 62 *Barb.*, 577—distinguished.

HEARING of objections to account of Simon C. Vedder and Alonzo Sweet, executors of decedent's will, filed in proceedings for judicial settlement. The facts appear sufficiently in the opinion.

GEORGE W. HARDING, *for executor, Vedder.*

RICHARDSON & ROBBINS, *for objectors.*

THE SURROGATE.—Upon this accounting, the lega-

## MATTER OF INGERSOLL.

tees object to the item of \$100 charged by Simon C. Vedder, one of the executors, for the use of the horse and wagon of the executor, claimed by him to have been used in the collection of the assets of the decedent. An investigation of the claim shows that the executor kept no account of the times when his horse and wagon were used, and when required to make up an itemized or detailed statement of it, declared his inability to do so. He has been allowed his bill for expenses paid for livery used in the business connected with the administration of the estate, and it now needs no citation of authority for such allowance for the actual disbursements so made by him, necessarily incurred in the management of the estate.

It is quite evident that, until the time when this executor was cited to account, he had no intention of charging for the use of his horse and wagon. He has made a charge, in gross, of \$100 for such use. If he could be allowed anything, considering the unsatisfactory condition and presentation of his claim, we think the amount claimed far too much. It has been urged by the executor that, if he had hired a livery for the same purpose for which he used his own horse and wagon, the sum paid would have been allowed him, and that there is no sound reason why he should not receive the same compensation for the use of his own property that he would have been compelled to pay, had he hired from another.

In *Collier v. Munn* (41 *N. Y.*, 143; s. c., 7 *Abb.*, *N. S.*, 193), it was held that, where an executor who was an attorney had performed legal services which were beneficial to the estate he represented, he could

## MATTER OF INGERSOLL.

not be allowed compensation for such services; and again, in *Morgan v. Hannas* (13 *Abb., N. S.*, 361), the same court denied the right of a mechanic to receive compensation for mechanical labor performed by him upon his ward's property: the reason for such decision, in the two cases above cited, being that a trustee should not be led into temptation to do anything in the administration of his trust for the mere sake of the compensation to accrue thereby.

"No man can faithfully serve two masters whose interests are in conflict" (Story on Agency, § 210). "It is a rule of necessity which the test of experience has rendered inflexible" (*Smith v. City of Albany*, 61 *N. Y.*, 444, 446). The law prohibits a judge from acting in a case where he is related to one of the parties. It is not left to his discretion, or to his sense of decency, whether he shall act or not. The urgency of a particular case is not to be considered. Partiality and bias are conclusively presumed from the relationship, and it disqualifies the judge. In the relationship of attorney and client, the law not only watches over all the transactions between the parties, but often declares transactions void, which, if the relationship did not exist, would be held proper. It does not so much consider the bearing or hardship in particular cases, as it does the importance of preventing a general public mischief, which may be brought about by means secret and inaccessible to judicial scrutiny; it supersedes the inquiry into the particular means in a given case, a task often difficult, and ill-supported by evidence which can be drawn from any satisfactory sources (1 Story Eq. Jur., §§ 310-312).

So, with the relationship of trustee and *cestui que trust*. A trustee is not permitted to obtain any profit or advantage to himself in the management of his trust: he may not buy for, nor sell to, his *cestui que trust* property in which he has a secret or individual interest. "The law permits no one to act in such inconsistent relationships. It does not stop to inquire whether the contract was fair or unfair. It stops the inquiry when the relationship is disclosed, and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them, as far as may be, impossible, knowing that real motives often elude the most searching inquiry, and it leaves neither judge nor jury the right to determine, upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall" (*Munson v. R. R. Co.*, 103 *N. F.*, 58, 74; 1 Story Eq. Jur., § 322).

These authorities all deny the right of a trustee to profit by any dealings with his trust: they also deny the validity of an agreement made by him, where he is so placed that he might derive a profit. His interests may be antagonistic to his trust, and experience shows us they often would be. No sound reason exists for giving an executor compensation for the use of his own property, while he would be denied the right of receiving compensation for professional services or the right to be allowed the value of his labor as a mechanic performed for the benefit of his *cestui*

*que trust.* As said by the Surrogate, in *Pullman v. Willets* (4 *Dem.*, 536), in a similar case, the "executor would be quite likely to have different views of the necessity of making frequent journeys, when he was to be paid for the use of his horse in making them, from what he would if the money for such travel was to be paid to another." There may be cases where the enforcement of such rule will work a hardship with the trustee, but we think that, in the end, more perfect justice will be worked by a strict enforcement of such rule, and we heartily concur in the authority of *Pullman v. Willets*, and deny the right of the executor to be paid anything for the use of his horse and wagon in the business of settling the testator's estate.

*Second.* The legatees next object to the allowance of \$100, paid by the executor to J. P. Manchester for "collecting bad debts." The executor contends that this item was an actual and necessary expense, made in the proper performance of his trust. Should this view prove to be correct, then the payment made was proper. This leads to an examination of the services performed by Manchester. It appears that he was a private banker at Hume; that, in a few instances, he permitted his name to be used as a plaintiff, in actions brought upon claims held by the estate against its debtors. One action was commenced in the Supreme court, where the defendant succeeded and a judgment for costs was rendered against Manchester, which judgment has been paid by the executor together with all of the costs, expenses and disbursements of plaintiff, made and incurred in the action. Three or four judgments were recovered in Justices' courts, in the name of



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Manchester, upon claims of the estate against its debtors, none of which have ever been paid, but the costs incurred by the plaintiff have been fully paid by the estate. It does not appear that he ever was present before the Justice, and it does affirmatively appear that he was in Alaska when the Supreme court action was tried. It does not appear that an hour of his time was ever taken, in the prosecution or management of the suits mentioned above; nor that he has done anything in the management of the matters, but that the executor could have performed as well.

It is also claimed by the executor that Manchester collected quite a sum for the estate, upon notes and accounts owned by the testator at the time of his death. An investigation of this claim shows that this amount was nearly all collected after this executor had been such for upwards of two years, and had then removed from this State, with his family, to Nebraska. All that need be said upon that point is that, if the executor saw fit to remove from this State, before he had settled his trust, and chose to appoint an agent to perform duties which the law had imposed upon him, if he be compelled to pay for such service, it should be from his own pocket and not from the estate of which he is a trustee.

From an examination of the executor's account as made by himself it appears that, for nearly four years, this executor has had under his control, belonging to this estate, a sum of money of not less than \$3,000 which money has been deposited with Manchester, and which we have the right to assume has been used by him in his business. In the spring of 1886, shortly

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before the executor Vedder went to Nebraska, his co-executor, who resided in this State remonstrated with Vedder, and insisted he should not leave this State until he had settled his trust, nor should he leave the unfinished business with Manchester, and the executor Vedder then said to his co-executor that Manchester would not charge a cent for his services. It is but fair that the executor shall stand by that promise, and make it good.

The debts of the estate were in all only about \$1,700, and the assets collected have been upward of \$20,000, so there has been no necessity for this executor to retain in his hands so large a sum. He permitted these moneys to remain with Manchester, and even if the latter had any claim for these trifling services performed for the estate, any sort of prudent care on the part of the executor would have required him to insist that the value of the use of these moneys far exceeded the value of the services, and that he ought not in fairness to present any claim. Had the legatees made claim in proper time, it is quite probable that this executor would have been charged with interest upon at least \$3,000, for the period of 18 months.

Their counsel are not negligent in omitting to raise this question promptly, for until about the time of the closing of the executor's examination, and until after they had an opportunity to analyze the account, they could not have ascertained its condition, and could not have known that such a large balance had all this time remained in his hands. The authorities of *O'Gara v. Clearkin* (58 *N. Y.*, 663); *McWhorter v. Benson*

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(*Hopk. Ch.*, 28); *Vanderheyden v. Vanderheyden* (2 *Paige*, 287); *Cairns v. Chaubert* (9 *Paige*, 160), and 3 W'ms on Ex'rs, do not warrant the allowance of this claim. These cases hold, substantially, that where, from peculiar circumstances or the peculiar nature or situation of the property, the services of an agent are essential in the care or management of the estate the value of such services may be paid from the estate. These elements do not exist in this case.

*Third.* The claim of the executor Vedder of \$118.98 made of the following items:

Car Fare from Nebraska to Hume, \$43.98

Hotel Bill on Journey . . . 8.00

Board of executor here, from March

28, 1887, to August 10, 1887 . . 67.00

must be disallowed.

At the time the testator's will was made, and until the spring of 1886, the executor Vedder resided at Hume, N. Y., the home of the decedent; the executor Sweet, a son of the decedent, then and ever since has lived in Madison county, in this State. Letters testamentary were issued to these executors February 13th, 1884; the executor Vedder has been the acting representative of the estate. For a period of more than two years prior to the spring of 1886, Vedder had been engaged in the administration of the estate, and then, for his own convenience, he moved to Nebraska, which State ever since has been his home. Before moving away, he had ascertained the situation and condition of the estate, and had converted into money the bulk of it. The claims of the decedent were then substantially all paid. Shortly before leaving for the

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west, the co-executor was at Hume and had a conference with Vedder, and insisted that Vedder should account before he left the State. He declined to do so, and left without having made a settlement, or passing over the remaining assets of the estate to his co-executor, residing here. Vedder had been permitted to manage the estate up to this time for the sake of convenience and economy, he being upon the ground where the debtors of the estate resided, and the other executor residing in a distant part of the State. —

In the spring of 1887, Vedder came back to Hume from Nebraska. After he had been here about two months, certain of the legatees cited him to show cause why he should not settle his accounts. After some delay, he filed a petition for a judicial and final settlement of his accounts, and from that time the two proceedings have been continued together.

Counsel for the executor Vedder cites the case of *Everts v. Everts* (62 *Barb.*, 577) as an authority for allowing the claim for car-fare and board upon his journey here. We do not so understand it. The facts of the case are not fully reported, yet we infer that the executor in that case was not a resident of this State when the will in question was made and when letters were granted him. We find (page 578) that, when he was about to depart from the State, his sureties applied to the Surrogate to be relieved from their obligations on account of his future acts or defaults. It seems he had given bonds for the faithful performance of his duties before this step was taken, and as no reason is given for exacting a bond from him, it may be inferred it was on account of

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his not residing in the State. This inference is strengthened by reading the opinion of Justice MULLIN, at page 581, where he said: "I think the Surrogate properly allowed the expenses of the executor in coming from Iowa when the will was proved. The testator knew that such journey must necessarily be made, and it was necessary to enable him to qualify."

In the case at bar, the testator chose one of his executors who resided in his neighborhood and the other who lived at a distant point in the State. It is highly improbable that he contemplated that his executors would remove from the State before they had closed their trust. They then resided here. More than two years elapsed from the time of their appointment before the executor removed from the State. Had he closed up his trust, within that time there would have been no necessity for a return, so far as this estate is concerned. Or, if the estate was not in a condition so that the accounts of the executors could then be finally settled, an intermediate accounting could have been had, the assets not fully converted into money passed over to the co-executor here, and the executor Vedder discharged from his trust. He elected not to do that, and, to suit his own convenience, left his accounts unsettled. There is no justice in his claim, and I am unable to find any authority warranting its allowance. The case of *Elliott v. Lewis* (3 *Edw. Ch.*, 40), cited by the counsel for the executor, does not sustain his position. There the VICE CHANCELLOR held that the expenses of the administratrix and her husband, in coming from Washington to New York, to be examined as witnesses in the pending

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foreclosure suit, were properly allowed; which decision was placed upon the ground that it was indispensable that they should so come and be examined. That case is clearly distinguishable from this. . . .

We have above considered all the objections raised, other than those passed upon during the progress of this contest, so that counsel will have no difficulty in preparing the proper decree to be entered in accordance with the views expressed.

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ORLEANS COUNTY.—HON. ISAAC S. SIGNOR, SURROGATE.— January, 1887.

LUDLAM v. HOLMAN.\*

*In the matter of the probate of the will of SUSAN COBB, deceased.*

The will of testatrix provided: "I give, devise and bequeath all my household furniture, wearing apparel and jewelry to A. and B., to be distributed as I may designate and direct them while living."—

*Held*, that this was an attempt to create a trust, void for uncertainty, in failing to give means of identifying the beneficiaries; and that the effects described fell into the residue.

CONSTRUCTION of will on application for probate. The facts appear sufficiently in the opinion.

WHEEDON & RYAN, for S. E. Ludlam.

S. E. FILKINS, for N. S. Holman.

THE SURROGATE.—This is a proceeding, under § 2624

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\* Appeal pending in Court of Appeals.

of the Code of Civil Procedure, for the construction of the following clause of the decedent's will: "*Eighth.* I give, devise and bequeath all my household furniture, wearing apparel and jewelry to Sally E. Ludlam and Nancy S. Holman, to be distributed as I may designate and direct them while living."

Counsel for Mrs. Ludlam claims that the bequest is void for indefiniteness, and is an attempt to dispose of property by parol, instead of by a written will; while counsel for Mrs. Holman claims that the intent, as expressed by this clause of the will, is to give the property to the two persons named, and so far is valid, and is only invalid as to the further direction, "to be distributed as I may designate and direct them while living," and insists that they take the property in equal shares, and irrespective of any directions afterwards given by the testatrix. Mrs. Ludlam is the residuary legatee named in the will.

This is not a bequest to the persons named, to be distributed as *they* may designate and direct, but as the testatrix may direct them in her lifetime. It is not necessary, in order to create a trust, that express words of trust should be used, if from the terms of the instrument an intent to create a trust is clearly implied; and in determining whether the testatrix intended, in this case, to create a trust or to make an absolute gift, resort may be had, not only to the clause in question, but to the entire instrument. The testatrix uses the words "to be distributed as I may designate and direct them," and, to complete the meaning, we may add the words, "to distribute said property."

It seems clear to me that the intent was, to constitute the two persons named trustees simply, and not to designate them as beneficiaries. She had made bequests to each separately, and had made a number of other bequests, and, in every other instance where property is bequeathed or devised, she uses the expression, "I give the same *absolutely*": It is a general rule of construction, laid down by Jarman, that words occurring more than once in a will shall be presumed to be used in the same sense, unless a contrary intention appear (2 Jarm. on Wills, 842), and it would seem that, where the same word is used in all clauses but one, its absence there should be regarded as of some significance; and that she did not intend to make this bequest to these persons *absolutely*, but *in trust*, to go to such beneficiaries as she should afterwards designate, and in such portions as she should direct.

The words, "to distribute the same," taken in their ordinary meaning, signify—"to divide among several," and are words of a broader signification than merely "to divide," or separate into parts; conveying the idea not only of dividing, but also of passing the articles divided over to the beneficiaries who were to be thereafter designated. The effect of such a bequest, if sustained, would be to allow the testatrix to name her trustees by the will, and to make the bequests by parol, or in any other manner, without the formalities and safeguards required in making a will.

In some instances, a power of distribution may be committed to executors, where the power of appointment has been exercised in the making of the will to



## ADAMS v. GLIDDEN.

such an extent that the beneficiaries are known, or can easily be ascertained (Power v. Cassidy, 79 *N. Y.*, 602), but in the clause under consideration, the testatrix gives her trustees neither the power of appointment nor of distribution, and gives no means of ascertaining who she intends shall be the beneficiaries. The trust cannot be executed, without further direction of the testatrix, nor, in fact, without a further will or codicil. Having arrived at this conclusion, I think there was a failure to create a valid trust, or to make any valid disposition of the property mentioned in this clause of the will, and, as it is all personal property, it becomes a part of the rest and residue of the estate, and passes by the residuary clause (Van Kleeck v. Dutch Church, 20 *Wend.*, 457; King v. Strong, 9 *Paige*, 94; Kerr v. Dougherty, 79 *N. Y.*, 327; Matter of Benson, 96 *N. Y.*, 499).

A decree may be entered accordingly.

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ORLEANS COUNTY.—HON. ISAAC S. SIGNOR, SURROGATE.—January, 1887.

ADAMS v. GLIDDEN.

*In the matter of the estate of GEORGE HOWARD, deceased.*

The same formality is not required, for the disputation of a claim against a decedent's estate, where proceedings for a judicial settlement are instituted under Code Civ. Pro., § 2729, as where a petition for payment is presented under id., § 2717.

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The effect of Code Civ. Pro., § 2743, which requires the decree, upon a judicial settlement of a representative's account, to make the determinations therein specified, "where the validity of a debt . . . . is not disputed," is to deprive the Surrogate's court of jurisdiction to determine a controversy, arising in such proceeding, between the accounting party and a third person seeking to enforce a claim against the estate.

Lambert v. Craft, 98 N. Y., 342—distinguished.

CONTEST over creditor's claim, upon judicial settlement of account of William Glidden, as executor of decedent's will. The facts appear sufficiently in the opinion.

KEELER & SALISBURY, *for executor.*

ARTHUR E. CLARK, *for creditor.*

THE SURROGATE.—C. W. Adams claims to be a creditor of the deceased, and claims that, on this settlement, he should be so adjudged and the executor's account surcharged with the amount of a certain promissory note which he holds against the estate, and the same be directed to be paid in full, or, if the assets are not sufficient to pay in full, paid *pro rata*. The executor claims that this note was presented a year or so ago, and duly rejected by him, and that the short statute of limitations has run against the claim. He also, on this settlement, disputes the claim, on the ground that he has an offset and defence thereto on the merits; also on the ground that the long statute of limitations has run against it. Counsel for the creditor denies that the claim has been rejected, and offers to show that it was duly presented and never rejected, and contends that the executor is

thereby estopped from disputing the claim. He also insists that, although the Surrogate's court may not pass on a disputed claim, it may pass upon the question of its rejection, and if the proofs show a proper presentation, and that it has never been rejected, it cannot be regarded as a disputed claim, and must be allowed.

In support of this proposition, he cites *Lambert v. Craft* (98 *N. Y.*, 342), and offers to show that the claim was not rejected. In that case, a creditor commenced proceedings to compel the payment of a debt under § 2717 of the Code of Civil Procedure. The executors, on the presentation of a petition by a creditor, were, by subd. 1 of § 2718, required to file a written answer, duly verified, disputing the claim, if they wished to dispute it; and as they had failed so to do, the court held that the claim was not disputed, and that it should be ordered paid, on its being shown that there were assets, as provided in subd. 2 of § 2718. DANFORTH, J., says, in his opinion: "If, therefore, after a reasonable opportunity for examination into the validity and fairness of a claim so presented, the executor does not offer to refer it, on the ground that he doubts its justice, or disputes it as unjust, it acquires the character of a liquidated and undisputed debt against the estate." In that case, it was, it seems, undisputed that, when the claim was presented, it was neither disputed nor allowed, and the learned judge says that, under the circumstances, it must be deemed an allowance of it, and, that applying the principles upon which an ordinary account becomes an account stated, the result is the same.

The Surrogate, in that case, decided nothing more than that the account was undisputed, and in this the courts held that he was right; but in that case they hold that it was in the power of the executor to put the claimant to proof of his claim in another court by filing the written verified answer required by § 2718.

In the case under consideration, the proceedings are commenced for a judicial settlement under § 2729, and the authority of this court to direct the payment of this claim, if there be any, must be derived from § 2743, or some power incident thereto, and necessary to enable it to be carried out (*Fiester v. Shepard*, 92 *N. Y.*, 251). By § 2743, "where the validity of a debt, claim or distributive share is not disputed or has been established, the decree must direct to whom it is payable," but when, on such a proceeding, the executor disputes the claim and refuses to allow it, the Surrogate may not take proofs and determine whether any grounds for rejecting the same exist or not.

Counsel for the claimant insists that there is a difference, in this respect, between a proceeding commenced by a creditor and a proceeding for a final settlement, but this cannot be the case, as, in either proceeding, the fact that a claim is disputed is enough to transfer the settlement of such a claim to another court. The mere fact that it is disputed is enough. The Code does not require the same formality, to dispute a claim on a final settlement, that is required under § 2718: that only applies to a proceeding begun by a creditor to compel payment of a claim.

In this matter, the executor contends that, should it be held that the claim has been presented, and not

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rejected but become a liquidated claim on account stated, he has not thereby been estopped from setting up the long statute of limitations as a defence which has now run against it (*Bucklin v. Chapin*, 1 *Lans.*, 443).

I cannot see how the claim can be regarded as any other than a disputed claim, of which this court has no jurisdiction; and I think the evidence offered on the rejection of the claim is both incompetent and immaterial, and that claimant's remedy, if any, is by action in a court having jurisdiction of disputed claims.

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ORLEANS COUNTY.—HON. ISAAC S. SIGNOR, SURROGATE.—May, 1888.

## ORPHAN ASYLUM v. WHITE.

*In the matter of the estate of ISRAEL STILES, deceased.*

The will of testator, which disposed of his real and personal property by the same clauses, (1) gave the use of all to his wife for life, with directions to the executors, if necessary, to expend the principal for her support, further providing that his daughter, E., should share in such use, if she stood in need thereof; (2) after the wife's death, gave "all the use of his remaining estate to E. and her husband, J., during their lifetime, respectively", (3) after the death of E. and J., bequeathed all the residue of his estate to an Orphan asylum, an institution incorporated in 1838. The instrument was executed within two months of the death of testator, who was survived by the beneficiaries. It was contended that the power of alienation and absolute ownership of property was suspended beyond the statutory limit.—*Held*,

1. That there was no trust, or contingent limitation, created, whereby the

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power of alienation of the real property was suspended for any period whatever.

2. That E. and J. took as tenants in common, with cross remainders; which, being invalid under the statute, might be dropped, and the gift to the asylum be held good to the extent of one half the testator's estate.
3. That, in order to determine the value of this half, the aggregate value of the several life interests, at the time of testator's death, should be deducted from the value, at that time, of the entire estate; and, it appearing that the whole remainder did not exceed one half of such estate, the asylum was entitled to receive the same,—one half payable upon E.'s death, and the other upon that of J.

Purdy v. Hayt, 92 *N. Y.*, 446—compared.

CONSTRUCTION of will, on judicial settlement of account of administrator, with decedent's will annexed. The facts are stated in the opinion.

W. C. RAMSDALE, *for administrator, c. t. a.; and*

JOHN H. WHITE, *administrator, c. t. a., in person.*

THOMPSON & SPENCER, *for Ellen E. Sanborn, and another.*

T. C. MONTGOMERY, *for Orphan Asylum.*

THE SURROGATE.—In order to determine what disposition shall be made of funds in the hands of the administrator, and to properly settle and allow his account, it becomes necessary to construe the will of the testator; which, under such circumstances, falls within the jurisdiction of this court (*Purdy v. Hayt*, 92 *N. Y.*, 446).

The testator gave both his real estate and personal property by the same clauses of the will. He first gives the use of all his property to his wife, during her life, with directions to his executors, if by reason of sickness, infirmity or accident, the interest of his estate shall be insufficient for her comfortable support

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and maintenance, to use so much of the principal as may be necessary for that purpose; and also provides that, should his daughter Ellen have need of it, she shall share with his wife in the use of his estate. After the death of his wife, he gives "All the use of my remaining estate . . . . . to my daughter Ellen E. Sanborn and to Josiah Sanborn, her husband, during their lifetime, respectively"; and, "Third. After the decease of my daughter and her husband, I bequeath all the residue of my estate to the Rochester City Orphan Asylum." It appears in evidence that there is no such institution as the Rochester City Orphan Asylum, but that the institution evidently meant was the Rochester Orphan Asylum, and they are entitled to any legacy that they would have been entitled to, if properly named (*Board of Missions v. Scoville*, 3 *Dem.*, 516). The will was executed within two months of the death of the testator, but the Rochester Orphan Asylum having been incorporated prior to ch. 319, Laws of 1848 (by act passed March 23d, 1838), that act does not affect this corporation, and the gift is not void on that account (*Kerr v. Dougherty*, 79 *N. Y.*, 327; *Stephenson v. Short*, 92 *N. Y.*, 433).

The act of 1860, however, does apply (ch. 360), and would render a devise or bequest to this society valid, only as to one half of the testator's estate, as he died leaving a wife and child, him surviving. The remaining questions are to be considered for the purpose of determining whether the gift of one half to the Rochester Orphan Asylum is valid. It is claimed that the will is void, as creating a trust, and suspending the power of alienation of the real estate, and the absolute

ownership of the personal property, beyond the statutory limit of two lives in being. The intent of the testator was evidently to give a life estate to his wife, then an estate to his daughter and her husband for life, with cross remainders; and such would be the effect of the will, unless the relation of husband and wife existing creates a different interest (*Purdy v. Hayt*, 92 *N. Y.*, 446, 452). In the last case, the testator gave his real estate to his two sisters "during their respective lives," and was held to create an estate as tenants in common, with cross remainders. The power of alienation is not suspended at all as to the real estate, by the will, as all the beneficiaries are in existence, and there is no contingent estate, that would interfere with the alienation of the real property. Immediately on the death of the testator, the widow, the daughter and her husband, and the Orphan Asylum could join in a conveyance, and pass the entire title. There are only two ways in which the power of alienation can be suspended, viz.: "by an express trust or power in trust, of such a character that the land cannot be alienated during its continuance, or by a contingent limitation" (per *RAPALLO, J.*, in *Radley v. Kuhn*, 97 *N. Y.*, 34; *Everitt v. Everitt*, 29 *N. Y.*, 71).

The contingent limitation does not exist, nor do I think that such a trust is created by the will. It has always been held, and is now the rule, that courts should seek to sustain the expressed will of the testator, where they can do so, and so far as it can be done, without contravening the express provisions of the statutes regulating testamentary dispositions.



Neither will a trust be raised by implication, where the only effect of such a construction would be to raise it for the purpose of destroying it as soon as created, or of invalidating the instrument by which it is created (*Smith v. Edwards*, 88 *N. Y.*, 102). The only portions of the will that could possibly be construed as tending to create a trust are the provisions authorizing the executors to apply a portion of the principal to the use of his wife in certain contingencies; which might seem to imply an intention that they should have the possession of the *corpus* of the estate for that purpose. But in that event, after the death of his wife, no necessity could arise for holding that the title was in the executors. They are not named as trustees, nor is any gift or devise made to them, either as trustees or executors. In fact, no power in reference to the real estate seems to be conferred on the executors, unless a power to sell the same for the benefit of the widow, should it become necessary to do so in her lifetime for her support, could be implied. This would, at all events, terminate at her death, and thereafter the property seems, without any contingency, to be absolutely vested in the beneficiaries, without any estate in the executors, and without any power conferred upon them to sell, lease or manage the real estate.

If the personal property is retained for the purpose of collecting and paying over the income, it does not necessarily require the creation of a trust to do this (*Smith v. Edwards*, *supra*). Nor does it appear certain that the executors were to hold the personal property during the lifetimes of the beneficiaries, should they

seek to obtain possession of it, upon tendering a proper bond (*Livingston v. Murray*, 68 *N. Y.*, 485). I cannot see that the will conveys any power or creates any trust in regard to the management of the real estate. There is no express direction conferring any such power, nor does there appear to be any provision in the will from which such an intent could be inferred; and I am, therefore, of the opinion that the administrator, in managing the real estate, has acted, and will, if he hereafter continues to act, do so, not by virtue of any power given him by the will, but as an agent for the parties interested, under an agreement with them, either express or implied. While a decision upon this hearing may only incidentally affect the real estate, it is nevertheless proper to discuss the rules and restrictions relating to its disposition and ownership, as it has been held by the Court of Appeals that the absolute ownership of personal property is only suspended in the same manner as is the power of alienation of real estate (*Gilman v. Reddington*, 24 *N. Y.*, 9-18; *Bliven v. Seymour*, 88 *N. Y.*, 469-478).

If this question had not been so settled, my own views would be in accordance with those expressed by the court, in *Converse v. Kellogg* (7 *Barb.*, 596). Section 1, 1 *R. S.*, 773 (3 *R. S.*, 7th ed., 2256), provides that the absolute ownership of personal property shall not be suspended for more than two lives in being, etc.; and § 2 provides as follows: "In all other respects, limitations of future or contingent interests of personal property shall be subject to the rules prescribed in the first chapter of this act, in relation to future estates in land." These rules provide that,

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where a remainder is limited on more than two life-estates, all the life estates, subsequent to those of the two persons first named, shall be void, and, upon the death of the two first named, the remainder shall take effect, in the same manner as if no other life estates had been created.

It is claimed, in this case, that, while the absolute ownership of personal property is suspended, provided the limitation in excess of two lives in being may be cut off, the remainder is still valid; but it is claimed, upon the other side, that the limitation is upon more than two lives in being, and so created that the excess of two lives cannot be cut off, and that, therefore, the remainder is invalid. The daughter and her husband, unless the relation of husband and wife establishes a different rule, would take as tenants in common, with cross remainders, after the termination of the life estate of the widow (*Purdy v. Hayt*, 92 *N. Y.*, 446). The estate of the widow would continue through one life; then the estate of the one first dying would continue through his or her life and during the life of the survivor, before actual payment of the remainder to the Orphan Asylum; which would clearly be more than two lives in being.

In *Purdy v. Hayt* (*supra*), the will gave certain real estate to the testator's sisters, Jane and Catherine, during their respective lives, and, after their death, he directed the income to be paid to his niece, during her life, and that, after her death, the principal should be paid to her children, should she leave any, and if not, to other beneficiaries named in the will. The court says, at page 452: "We are of opinion that, by

the true construction of the will, the devise to the testator's sisters, Jane and Catherine, vested in them a life estate in the farm as tenants in common, with cross remainders." In that case, the will gave the executors power to sell after the death of Jane and Catherine. In this case, the Asylum is to take "after the death of Ellen and her husband." The court in that case say, further, at page 455: "The law, as we have seen, permits only two successive estates in the same property. The two sisters of the testator took, as we have held, an estate in the farm as tenants in common, with cross remainders for life. The life estate of his sister Jane, who first died, terminated on her death, and her enjoyment constituted one life estate in her share. A second life estate in that share then vested in her sister Catherine, and was spent at her death. The limit of the statute as to that share was then reached, and no subsequent life estate therein could be limited either in the land or the proceeds;" and held that the life estate in the proceeds of that share, attempted to be created, was void, but that, in the case of the other sister's share, but one life estate had run at her death, and that, therefore, an additional life estate could be created before the remainder took effect.

This case is similar in many respects. The gift there was first to the two as tenants in common, by words in substance the same as those by which the gift in this case is made to Mrs. Sanborn and her husband. The cross remainders were regarded as equivalent to a life estate, which might be struck out when necessary to save the devise of the remainder. Notwith-

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standing the tendency of the decisions to hold that the common law relations of husband and wife still exist, to some considerable extent, in respect to property (*Zorntlein v. Bram*, 100 *N. Y.*, 12; *Robins v. McClure*, 100 *N. Y.*, 328), in this case these decisions can have no effect. If the husband takes at all after the wife's death, it is by virtue of the will, and not by virtue of his being her husband. At her death, all her interest ceases, and there would be nothing to pass over to her husband as such, but the will provides, in legal effect, that he shall, in such event, become the legatee to the use which she had before enjoyed.

The interests are distinct, although undivided during the lifetime of both. The husband could not, as such, have any interest in the body of the estate, of which the wife had the use, as she never was the owner of that. The husband and wife in this case were neither joint tenants nor tenants by the entirety, and neither could take anything by right of survivorship. Their interests were the same as if they were unmarried. Regarding them, then, as tenants in common with cross remainders, the cross remainders, being in effect a third life estate, may be dropped, and the gift of one half of the remainder of the testator's estate be held good.

This brings us to the consideration of the share of the estate taken by the Asylum, or rather to the question, what constitutes one half of the estate at the time of the testator's death, within the meaning of the statute. The rule for ascertaining this is laid down in *Hollis v. Drew Theol. Seminary* (95 *N. Y.*,

166), and must be followed in this case. The time must be of the death of the testator (*Harris v. Am. Bib. Soc.*, 2 *Abb.Ct. App. Dec.*, 316). To determine the amount of his estate in accordance with these rules, the widow's dower in the real estate should first be ascertained and deducted (*Chamberlain v. Chamberlain*, 43 *N. Y.*, 424). This should ordinarily be ascertained on the principle of life annuities. This method is resorted to, where the time is not actually known, but in this case it appears that the widow lived six years and .833 of a year; so we may adopt that as the number of years' purchase of her annual dower interest. The value of an estate need not be determined by an annuity table in all instances, but may be ascertained by such other means as are in any case available (95 *N. Y.*, 179). The value of the real estate is conceded to have been, at the death of the testator, \$1,300. One third of this, or \$433.33, at five per cent., for 6.883 years, is equal to \$148.05. The whole property was stipulated to have been worth at the testator's death, and over and above his debts, \$6,674.54; deduct the dower, and it leaves \$6,526.49.

If my views are correct, as to the manner in which the daughter and her husband hold, they are each practically entitled to the use of one half of this amount, or, computed at five per cent., an annuity of \$163.16. Mrs. Sanborn, at the death of the testator, was 41 years of age, and by the Northampton table her annuity was worth 11.695 years' purchase, or \$1,908.16. Mr. Sanborn's age was 58 and his annuity was worth 8.801 years' purchase, or \$1,436.97. The present worth of all the legacies was the present

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worth of the life estates and remainders making up the sum of \$6,526.49. The gift of the whole of this, payable one half at the death of Mrs. Sanborn and one half at the death of Mr. Sanborn, is not equal to the two life estates, and therefore is not in excess of the amount which the testator could give to a charitable society. The words of the will, giving the remainder after the death of the life tenant, did not postpone its vesting (*Baker v. Woods*, 1 *Sandf. Ch.*, 131; *Matter of Mahan*, 98 *N. Y.*, 372).

The administrator is entitled to claim his full commissions on income which has annually been ascertained and paid over (*Hancox v. Meeker*, 95 *N. Y.*, 528). Where an annual ascertainment and paying over of income has not actually taken place, he is entitled to only one set of commissions for receiving and paying out, to be computed on the aggregate amount of principal and income, re-investments not being included in this aggregate (*Betts v. Betts*, 4 *Abb. N. C.*, 437).

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MADISON COUNTY.—HON. A. D. KENNEDY, SURROGATE.—March, 1888.

## WARRIMER v. PEOPLE.

*In the matter of the estate of VASHTI THOMPSON, deceased.*

Upon a state of facts arising between the dates of the passage of the "act to tax gifts, legacies," etc. (L. 1885, ch. 483), and of the subsequent act, L. 1887, ch. 713, the law continues as if the latter statute had not been enacted.

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W. was an "adopted child" of decedent, within the terms of the act of 1887 (ch. 713). The latter having died September 9th, 1886, leaving a will whereunder W. took an interest of the value of more than \$500,—*Held*, that the legacy tax, on W.'s estate, became due and payable on the date mentioned; and that the right of the State, thus fixed and vested, remained unaffected by the passage of the act of 1887.  
*Matter of Cager*, 27 *Week. Dig.*, 541—criticised.

ASSESSMENT of "collateral inheritance tax," under L. 1885, ch. 483, upon legacy to adopted child of decedent. The facts appear sufficiently in the opinion.

THE PARTIES IN INTEREST *appeared, in person, and submitted their case to the court.*

THE SURROGATE.—The decedent, being a resident of the town of Hamilton, in this county, died September 9th, 1886, leaving a last will and testament, which was duly admitted to probate by a decree of this court made October 4th, 1886. The residuary legatee and devisee under the will is Mrs. Frank Warrimer, and under its provisions she receives an estate of the value of more than five hundred dollars; Mrs. W. is described in the will as the "adopted daughter" of the decedent, and the mutually acknowledged relation of parent and child had existed between them for more than ten years.

Chapter 483 of the Laws of 1885, commonly known as the "Collateral Inheritance Tax Law," was passed June 10th, 1885, and took effect June 30th, 1885. In substance, this act imposes a tax of five per centum upon all property which shall, after the passage of the act, pass by will, or by the intestate laws of the State, to any person or corporation, except certain relatives of the decedent enumerated in the statute, and certain



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corporations and institutions now exempted by law from taxation. Adopted children are not among those excepted from the operation of the statute. Section 4 of the act provides that "all taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent." The act makes certain exceptions to this rule, but none which can in any possible way affect the question involved in this case.

Chapter 713 of the Laws of 1887, is entitled "An act to amend Chapter 483 of the Laws of 1885, entitled 'An act to tax gifts, legacies and collateral inheritances in certain cases.'" This act was passed June 25th, 1887, and took effect immediately. It provides that the act of 1885 "is hereby amended so as to read as follows: '§ 1. After the passage of this act,' " etc.

Section 1 of the act, the section which imposes the tax, is identical with the act of 1885, with the exception of some unimportant changes in grammatical construction, and except that it adds to the list of persons exempted from the tax "any child or children adopted as such in conformity with the laws of the State of New York, or any person to whom the deceased for not less than ten years prior to his or her death stood in the mutually acknowledged relation of a parent." The act closes with the usual clause repealing all acts and parts of acts inconsistent with its provisions. Upon this state of facts, and under this condition of the law, it is claimed that Mrs. W. is not liable to pay the tax.

As we have seen, the act of 1885 took effect more

than 14 months prior to the death of Mrs. T., and the act of 1887 took effect more than 8 months after her decease. It is beyond question that the act of 1885 imposed a tax upon Mrs. W.'s interest in the estate, and it is equally clear that the tax became due and payable on September 9th, 1886 (see § 4), and on that day the right of the State to receive the tax became fixed and vested.

Has the State, by the passage of the act of 1887, remitted the tax so imposed upon this estate, and surrendered its fixed and vested right therein? What effect did the amendment of 1887 have upon the act of 1885? This question is fully answered by a long line of authorities in this State, the leading case perhaps, being the case of *Ely v. Holton* (15 *N. Y.*, 595).

In that case, it was held that "the effect of amending a statute by enacting that the statute is amended so as to read as follows," and then incorporating the changes or additions with so much of the former statute as is retained, is not that the portions of the amended statute, which are merely copied without change, are to be considered as having been repealed and again re-enacted, nor that the new provisions or the changed portions should be deemed to have been the law at any time prior to the passage of the amended act. The part which remains unchanged is to be considered as having continued the law from the time of its original enactment, and the new or changed portion to have become law only at and subsequent to the amendment. The word 'hereafter' occurring in a statute amended in the manner above described is to be construed distributively. As to the

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original provisions, it means subsequent to the time of their enactment; as to the new portions, it means subsequent to the time the amendment introducing them took effect."

To the same effect, see *Dash v. Van Kleeck* (7 *Johns.*, 477); *Sanford v. Bennett* (24 *N. Y.*, 20); *People v. B'd of Sup.* (43 *N. Y.*, 130); *Moore v. Mausert* (49 *N. Y.*, 332); *Benton v. Wickwire* (54 *N. Y.*, 226); *Colman v. Shattuck* (2 *Hun*, 497); *Cook v. R. R. Co.* (10 *Hun*, 426); *Moran v. Lydecker* (27 *Hun*, 582); *Calhoun v. D. & M. R. R. Co.* (28 *Hun*, 379); *Nash v. White's Bank* (37 *Hun*, 57).

Again, it is an elementary principle that a statute is not to be deemed retroactive, and is never to be considered as applying to cases which arose previously to its passage, unless the legislature have clearly declared such to be the intention (*Bacon's Abr.*, Statute, C.; *Broom's Leg. Max.*, 14; 1 *Kent Com.*, 455; and cases above cited). And it is now settled that an amendment has no more retroactive effect than an original act upon the same subject (*Benton v. Wickwire* (*supra*)).

A correct application of these fundamental principles to the facts in this case can lead to but one conclusion. As we have already seen, the State became entitled to this tax months before the passage of the act of 1887. There is not a word in the act of 1887 which indicates any intention on the part of the legislature that the statute should be retroactive in its effect.

Upon a state of facts arising between the passage

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of the two acts, the law continues, as though the act of 1887 had never been enacted.

It can, therefore, have no application to the adopted children of decedents dying between June 30th, 1885, and June 25th, 1887. Its passage found them liable to the payment of this tax, and it leaves them as it found them.

So far as the opinion in the Matter of Cager (27 *Week. Dig.*, 541) holds that the act of 1887 is applicable to a case of this kind, it is *dictum*. The case was decided upon another ground.

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MADISON COUNTY.—HON. A. D. KENNEDY, SURROGATE.—March, 1888.

## MATTER OF SOUTHWORTH.

*In the matter of the estate of JOEL SOUTHWORTH, deceased.*

Decedent died intestate, leaving, him surviving, no descendants, parent, widow, brother or sister; but nieces and nephews, of the half blood and of the whole blood.—

*Held*, that the former were next of kin "in equal degree to the deceased" with the latter; and that they all took equal shares of the personal estate, under 2 R. S., 96, § 75, subd. 9, 11, 12.

HEARING of objections to account of administrator of decedent's estate. The facts are stated in the opinion.

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MATTER OF SOUTHWORTH.

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THE PARTIES IN INTEREST appeared, in person, and submitted their case to the court.

THE SURROGATE.—The decedent died intestate, leaving him surviving no widow; no child, or other descendant; and no father, mother, brother or sister; but leaving the children of two brothers and two sisters of the whole blood, and the children of one brother of the half blood.

On behalf of certain nephews and nieces of the whole blood, it is contended that the nephews and nieces of the half blood are not entitled to share in the distribution of decedent's personal estate. We are clearly of the opinion that this position cannot be sustained.

Probably the view entertained by the relatives of the whole blood arises from and is based upon the language of subd. 11 of the Statute of Distributions (2 R. S., 96, § 75): "No representation shall be admitted among collaterals after brothers' and sisters' children."

But there is no question of representation in this case, for the next of kin are all related to the decedent in equal degree, and by the provisions of subd. 9 of the Statute of Distributions, they take share and share alike, and not by representation, the parent's share.

But if it is claimed that technically the children of deceased brothers and sisters take by representation in cases where there are no nearer relatives, then subd. 12 of the statute clearly places those of the half blood upon an equal footing with those of the whole blood, and indeed this section would seem to place this whole

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question beyond dispute: "Relatives of the half blood shall take equally with those of the whole blood and the representatives of such relatives shall take in the same manner as those of the whole blood."

This position is also abundantly sustained by authority. Nowhere in any of the elementary works does it seem to be questioned, and the decisions of the courts although not numerous are all in accord and in the same direction. "Brothers and sisters of the half blood are entitled to an equal share of the intestate's estate with those of the whole blood" (Wms. on Ex'rs, 6th Am. ed., 1621).

See, also, Schouler on Ex'rs and Adm'rs, § 501; 3 Redf. on Wills (2d ed., 423); *Hallett v. Hare* (5 Paige, 315); *Matter of Suckley* (11 Hun, 344).

In *Hallett v. Hare* (*supra*), the decedent died intestate, having only collateral relatives, the nearest being an aunt of the half blood on the father's side and an aunt of the whole blood on the mother's side.

Chancellor WALWORTH, in delivering the opinion of the court, says. "No representation being allowed among collaterals after brothers' and sisters' children, the two aunts who were the nearest relatives and in the same degree of kindred to the intestate were entitled to share equally in her personal property." The Chancellor further says that the rule of law has not been changed by the Revised Statutes, but "it has been considered as settled ever since the decision of the House of Lords, in *Watts v. Crooke* (*Show. Cas. in Parl.*, 108), that in successions of personal estates, relatives of the half blood in equal degrees of cognation to the intestate take equally with the whole blood, and

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MATTER OF SOUTHWORTH.

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that they also take by representation, when representation would be allowed among relatives of the whole blood in the same degree."

In the Matter of Suckley (*supra*), the decedent died intestate, leaving him surviving a brother and sister and four *grandchildren* of a deceased *half brother*. The court, of course, held that the grandchildren were not entitled to share in the distribution, but in the course of the opinion they say: "In this case, the claimants instead of being a brother's children, are grandchildren of a *half brother*. There is no difficulty however about this last point, for our statute provides that relatives of the half blood shall take equally with those of the whole blood in the same degree; but the objection raised to the distribution of any portion of this fund to these grandchildren is, that they are one degree beyond the statute."

From the above authorities, as well as from the plain and unambiguous language of the statute itself, the conclusion is irresistible that the decree in this matter must direct distribution of the estate among the nephews and nieces of the half blood and those of the whole blood, *share and share alike*.

MONROE COUNTY.—HON. J. A. ADLINGTON, SURROGATE.—November, 1886.

BARKER v. SOUTHERLAND.

*In the matter of the estate of JOHN McCONVILL, deceased.*

Testator, by his will, gave his entire estate, which consisted exclusively of personalty, to A., to hold the same in trust during the minority of testator's son, B.; adding: "and *after* he" (B.) "shall arrive at the age of 21 years, I give, devise and bequeath the same to" B., "his heirs and assigns forever." A subsequent clause provided: "*In case*" B. "shall die before arriving at the age of 21 years, then I give and bequeath to C. the sum of \$5,000, and all the rest . . . of my estate I give" . . . to A. and four others, to be equally divided among them. Of the beneficiaries, all of whom survived the testator, C., A. and another residuary legatee died before B., who died an infant.—*Held*,

1. That A., as trustee, took a vested estate, to continue until B.'s majority, or death in infancy, and unaffected by the provisions of the R. S., respecting the validity of trust estates.
2. That B.'s estate was contingent, depending upon the condition precedent of his attaining majority.
3. That the estates of all the subsequent beneficiaries vested, in right, at the death of testator, became absolute on B.'s death, and passed to their representatives, under 1 R. S., 724, § 25.

*Hennessy v. Patterson*, 85 N. Y., 91—compared.

*Williams v. Seaman*, 3 Redf., 148—discussed.

CONSTRUCTION of decedent's will, in special proceeding instituted to procure a decree judicially settling the account of A. F. Southerland, as sole trustee thereunder, and directing a distribution of the fund.

E. F. HYDE, *for trustee and others.*

SATTERLEE & YEOMAN, and H. L. BARKER, *for residuary legatees.*



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BARKER V. SOUTHERLAND.

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H. H. WOODWARD, and E. F. WELLINGTON, for executors of residuary legatees.

THE SURROGATE.—In this proceeding, brought to obtain a final settlement of the account of the trustee above named, and a decree for the distribution of the trust estate, it becomes necessary to construe the will of decedent, under which the trust arose.

The material portions of that will are as follows, viz. : "I give, devise and bequeath all my estate, both real and personal, to James Cochrane, Esq., of Rochester, to hold the same in trust during the minority of my son, Andrew Stout McConvill, and after he shall arrive at the age of twenty-one years I give, devise and bequeath the same to said Andrew Stout McConvill his heirs and assigns forever."

"In case said Andrew Stout McConvill shall die before arriving at the age of twenty-one years, then I give and bequeath to Andrew V. Stout, of the city of New York, the sum of five thousand dollars, and all the rest and residue of my estate, both real and personal, I give, devise and bequeath to John Lutes, James C. Cochrane, Hiram L. Barker, John W. Kelly and John A. Colwell, to be divided among them, share and share alike."

James C. Cochrane was made sole executor of the will, and after its probate on October 4th, 1873, duly entered upon the discharge of his duty, both as executor and trustee. The will was executed on September 4th, 1873, and on September 8th, 1873, the testator died, leaving an only son, Andrew Stout McConvill, then about four years of age, and also several brothers and sisters. His estate consisted wholly

of personal property, and was valued at about \$27,000. Four of the persons, named in the decedent's will as beneficiaries thereunder upon certain contingencies, have departed this life since the probate of the will, and before the beginning of this proceeding. John W. Kelly died January 28th, 1875. James C. Cochrane, on January 25th, 1881, and Andrew V. Stout on September 5th, 1883. Each left a will, duly admitted to probate, disposing of his entire estate. The executors of each appear in this proceeding. The testator's only son, Andrew Stout McConvill, died April 20th, 1885, at the age of sixteen years.

After the death of Mr. Cochrane this petitioner, Mr. Southerland was duly appointed sole trustee under the will. By reason of the death of Kelly, Cochrane and Stout, before the happening of the event which would have entitled them to receive their respective interests under the will, viz.: the decease of the testator's son during minority, the following questions arise:

*First.* Did the legacy to Stout, or the residuary interests of Kelly and Cochrane lapse?

*Second.* In case of such lapse, what disposition should be made of the lapsed portion of the fund in the distribution of the estate?

The counsel for the decedent's next of kin insists that the rights of all the persons last mentioned to take, under the will, depended upon their surviving the death of the son, Andrew, before attaining his majority; and that the decedent died intestate as to the sums which said beneficiaries would have received in the event of such survival.

On behalf of the residuary legatees, it is maintained

that only the legacy to Stout lapsed, and that the surviving residuary legatees, and the legal representatives of those deceased, take the entire estate.

The executors of Stout claim the right to the latter's legacy under his will.

The second of the questions above stated is answered by rules of law, well settled and easily applied, and can only become important in case the first question shall be answered in the affirmative. Whether or not the interests of Stout, Kelly and Cochrane, or either of them, lapsed through the death of the legatee during the lifetime of Andrew Stout McConvill becomes, therefore, the primary and principal subject for consideration. The intention of the testator, as disclosed by his will, must be our guide to the solution of this inquiry, and that intention is not controlled by punctuation, or strict grammatical rules (*Arcularius v. Geisenhainer*, 3 *Bradf.*, 64, *Pond v. Bergh*; 10 *Paige*, 141). It seems to be unnecessary to discuss separately the legacy to Stout and the residuary interests of Kelly and Cochrane. One is as much a future interest in personal property, within the meaning of the Revised Statutes hereinafter referred to, as is the other. They each depend upon the same contingency, to wit, the death of the son during minority. The words upon which the gift in each case depends, are these: "In case said Andrew Stout McConvill shall die before arriving at the age of twenty-one years." The word, "then," only emphasizes the event upon which the gift becomes absolute, and refers back to the words relating to the death of Andrew which precede. It is as though the testator had said: "*In*

*case of the death of my son Andrew, in that event,* or "*in such case, I give.*" The fair grammatical construction of the paragraph, with a view of ascertaining the intent of the testator would require the same effect to be given to "*then,*" in the residuary clause as in the one relating to Stout. It cannot well be said to belong to the one more than the other. I do not think there was any intention to postpone the right to the gift, but only the time at which, if ever, it should take effect in possession; in other words, it was intended to make the rights of the legatees contingent only upon Andrew's death under age, without annexing to the gift the further condition of survivorship. "*Then*" sometimes indicates an order or succession of events (Cressons' Appeal, 76 Penn. St., 21). For cases in which "*then*" has been similarly used and construed, see *Bedell v. Guyon* (12 Hun, 396, 398); *Hennessy v. Patterson* (85 N. Y., 91); *Matter of Mahan* (98 N. Y., 376).

Before proceeding to consider the main question, it will be of advantage to ascertain the nature of the estate which passed upon the death of the testator to the trustee, Mr. Cochrane, and to the son, Andrew. The trustee took a vested estate in possession, to continue until the son's majority or death before that time arrived. This trust, relating only to personalty, was not affected by the provisions of the Rev. Stat. in respect to the validity of trust estates (*Savage v. Burnham*, 17 N. Y., 571; *Gilman v. Reddington*, 24 *id.*, 12, 13; *Graff v. Bonnett*, 31 *id.*, 19; *Power v. Cassidy*, 79 *id.*, 613). No estate could vest in the son, Andrew, unless he should live to the age of

twenty-one years. The language of the will seems to be plain upon this point: "*After he shall arrive at the age of twenty-one years*, I give, devise and bequeath the estate to him, his heirs and assigns forever." That this is the case, is also clear upon authority (2 Wm's on Ex'rs, 6th Am. ed., 1326, 1327; 1 Roper on Legacies, 2d Am. ed., 565; Leake v. Robinson, 2 Merivale, 363; Kenyon v. See, 94 N. Y., 563; Wylie v. Lockwood, 86 N. Y., 291, 297; Bushnell v. Carpenter, 92 N. Y., 270, 274; Patterson v. Ellis, 11 Wend., 268).

Andrew's estate was contingent upon his arriving at the age of twenty-one years, and his right to have it vest, either in interest or possession, was dependent upon the same event. Nothing could pass, therefore, to his administrator upon his death during his minority. Under the provisions of the Revised Statutes (1 R. S., 773, § 2), "limitations of future or contingent interests in personal property" are made "subject to the rules prescribed in relation to future estates in land." The interests of the deceased legatees, and the rights of their legal representatives therein, must, therefore, be determined upon the same principles as would be applied if the decedent's estate consisted wholly of land.

Sec. 10 defines a future estate in land as "an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time." Id., 723, § 13, declares that "future estates are either vested or contingent. They are vested when

there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom, or the event upon which, they are limited to take effect, remains uncertain." *Id.*, 724, § 25, is as follows: "Two or more future estates may also be created to take effect in the alternative, so that if the first in order fail to vest, the next in succession shall be substituted for it, and take effect accordingly." Under *id.*, 725, § 35, future estates, whether vested or contingent, are descendible, devisable and alienable.

It seems plain under the foregoing definitions, as well as for the reasons before stated, that Andrew Stout McConvill took a contingent future estate, to which was annexed the condition precedent that he should live to be twenty-one years of age, before such estate could vest either in right or possession. It has been plausibly argued that each of the legatees named in the will took on the death of the testator, a vested estate, as the same is defined in § 13 above quoted. It is said that they were *persons in being* who would have an immediate right to the possession of the property upon the ceasing of the intermediate or precedent estate, and that the estate vested in the trustee was such precedent estate. On the other hand, it is maintained that the estate of each legatee was contingent while the event upon which they were limited, to wit, the death of Andrew under age, remained uncertain.

I am of the opinion that the latter is the correct view of the matter and that the estate of the son, as

well as that of each legatee was a contingent one, created to take effect in the alternative, according to the provisions of § 25 of the R. S., above quoted. The interests of the several legatees vested, in right, upon the decease of the testator to become absolute upon the death of Andrew during his minority, and liable to be wholly divested by his attaining the age of twenty-one years (*Smith v. Scholtz*, 68 *N. Y.*, 61; *Hennessy v. Patterson*, 85 *N. Y.*, 99; *Kenyon v. See*, 94 *N. Y.*, 568). The interests of the deceased legatees, therefore, having vested in right, passed to their legal representatives upon their respective deaths, notwithstanding the fact that, Andrew still living, their right of possession had not yet accrued (R. S., *supra*, § 35, and cases last cited). Such interests would have passed by will even at common law (*Winslow v. Goodwin*, 7 *Metc.*, 363, 377; *Pond v. Bergh*, 10 *Paige*, 140, 153; *Hennessy v. Patterson*, 85 *N. Y.*, 99; 2 Washb. on Real Property, 582).

The case of *Hennessy v. Patterson* (85 *N. Y.*, 91), seems to be similar in its facts to the present one, and decisive of it in principle. In that case, the testator devised certain premises to his wife for life, for her own and her daughter's benefit. He then provided that, if the daughter, Margaret, should marry and die leaving children, the property should go to such children, but in case of her death without issue *then* the property should be left to a nephew John Foley. The widow died after the testator; Margaret married but died childless; Foley died after the widow and before Margaret. It was held that Foley took a contingent remainder, which vested in him as a right, according to

its character, on the death of the testator; and that Foley's interest descended to his heirs and vested absolutely in them upon the death of Margaret without children.

The cases of *Vincent v. Newhouse* (83 *N. Y.*, 505); *Delaney v. McCormack* (88 *N. Y.*, 174); and *Shipman v. Rollins* (98 *N. Y.*, 311); cited as establishing the proposition that the interests of Stout, Kelly and Cochran were dependent upon their surviving the death of Andrew are clearly distinguishable from the case under consideration. In those cases, the fund to be ultimately distributed was not in existence at the death of the testator, but was to be created at a subsequent period by the sale of real estate, and until the creation of the fund no estate therein could vest either in interest or possession. In *Kelso v. Lorillard* (85 *N. Y.*, 177), and *Magill v. McMillan* (23 *Hun*, 193), the further condition of survivorship was annexed to the gift, by the express language of the will.

The case of *Williams v. Seaman* (3 *Redf.*, 148), so much relied on by counsel, seems to me to have no bearing upon the question under consideration here.

Although the statement of facts in that case is very defective, and leaves it wholly uncertain whether Julia, the residuary legatee, died before the testator or after her, yet the fact that Julia's death preceded her testator's is made apparent from the opinion of the learned Surrogate. On page 150, that statement is made in express terms in connection with the discussion of the case of *Burtis v. Doughty*. The paragraph quoted from 1 *Roper on Legacies*, 465, near the beginning of the opinion (p. 149) bears directly upon



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the effect of the legatee's death during the lifetime of the testator. The other authorities cited and discussed relate wholly to the effect of the word "heirs" in a bequest, and there is nothing in the case which can throw light upon the question of lapse as it comes up in the present case.

My conclusion is, therefore, that the right to the legacy of Stout, and to the residuary interests of Kelly and Cochrane passed, upon their respective deaths, to their legal representatives, and that, after payment of such legacy to Stout's executors, the residue of the estate should be paid over in equal one fifth parts to Hiram L. Barker, John Lutes, John A. Colwell, and the executors of John W. Kelly and the executors of James C. Cochrane.

A decree in accordance with the foregoing opinion may be entered on five days' notice to the parties who have appeared herein.

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MONROE COUNTY.—HON. J. A. ADLINGTON, SUBROGATE.—December, 1886.

KENYON v. REYNOLDS.

*In the matter of the estate of ABELARD REYNOLDS, deceased.*

The second clause of testator's will gave to his wife the use, for life, of all the goods, furniture "and all other personal property (other than money, choses in action and securities)," which should be in or upon

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the homestead at his death. The third clause gave to his son, M., his property "in R., known as R. Arcade, . . . . with all the lands, buildings and appurtenances thereunto belonging, and all the furniture and *personal property* in and upon same or in any manner connected therewith." The residue of the estate, "both real and *personal*," was disposed of, mainly for the benefit of two granddaughters. There was no personal property, of any value, except what was in and upon "the Arcade"; where were found money, evidences of deposit, securities and choses in action.—

*Held*, that M. took, under the third clause, with the Arcade, the furniture, and other *personal property* connected, and suitable for use, therewith; and that the money, securities, etc., formed a part of the residue.

CONSTRUCTION of decedent's will, upon judicial settlement of account of executor thereof; whereto objections were filed by the residuary legatee.

DONALD McNAUGHTON, and THEODORE BACON, for executor.

McGUIRE, SULLY & CLINTON, for objectors.

THE SURROGATE.—This proceeding was begun to procure a final settlement of the account of Mortimer F. Reynolds, as executor of the will of the testator. In his account as filed, the executor claims title to all personal property belonging to the decedent at his death which was then in and upon the Arcade property in the city of Rochester, consisting of money, bank deposits, securities and accounts. He asserts ownership in all such property by virtue of the bequest contained in the third subdivision of the will, which portion of said will, with certain other parts thereof, is hereinafter set forth. The amount of property so claimed by the executor is of the value of upwards of \$12,000. The granddaughters of the decedent, Mrs. Kenyon and Mrs. Shepard, the residuary legatees,

contest this claim of the executor and insist that the bequest to Mortimer F. Reynolds of all the furniture and personal property, as set forth in the third subdivision of the will, carries only such personal property in addition to furniture as naturally and properly belongs with the Arcade building and is ordinarily used in connection with the same to render it fit for occupation. In other words, the contestants maintain that the words "personal property" in the bequest, must be construed according to the rule of *ejusdem generis*. The executor, on the other hand, contends that these words, "personal property," are to have their broadest and largest meaning; and, on his behalf, it is further insisted that, by excepting out of the operation of the words "all other personal property" in the second subdivision of the will, whatever comes under the head of money, choses in action and securities, and by not annexing similar restrictive words to the bequest of personal property in the third subdivision above referred to, the testator thereby indicated his intention to give to the words, "personal property," in the latter, their largest and most comprehensive sense. The following are the only portions of the will material to be considered in this discussion:

"*Second.* I give and bequeath to my said wife, all the provisions and supplies of every kind which may be on hand at my said homestead at the time of my decease, and the use, during her life, of all household furniture, goods, carriages, harness and all other personal property (other than money, choses in action and securities) which shall be in or upon the premises

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at my said homestead, or habitually kept there at the time of my decease.

"*Third.* I give, devise and bequeath to my son, Mortimer F. Reynolds, my property situated upon West Main (formerly Buffalo) street, in said city of Rochester, extending through to Exchange Place, in the rear, known as Reynolds Arcade, including also East Arcade (so called) with all the lands, buildings and appurtenances thereunto belonging, or in any wise appertaining, and including all the furniture and personal property in and upon the same, or in any manner connected therewith, to have and to hold the same to his own use and benefit forever, subject however to the payment of the following sums:

\* \* \* \* \*

"*Fifth.* I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal to my said son and executor Mortimer F. Reynolds, in trust, to sell and dispose of the same and convert the whole into money or into good and safe securities and out of the proceeds, to pay:

\* \* \* \* \*

The remainder of the trust fund to be realized from the sale herein directed, to be divided equally between my two granddaughters, one half to each. The furniture and personal property, the use of which is given in connection with the homestead to my wife is not however to be sold, in case she accepts the provision herein made for her benefit, until after her decease, and whenever sold, the avails are to be divided equally between my said granddaughters."

No New York cases, bearing upon the question here

presented were cited on the argument herein and I have myself found none, but cases construing language, more or less similar to that used by this testator are found in the reports of other States of the Union, and of England. Although the decisions are conflicting and at first glance irreconcilable, yet a careful examination of them will show that for the most part, they fall within one or the other of the following classes, namely :

1. Cases in which the will to be construed had no residuary clause, and the court has given an extensive signification to the general words of the bequest, for the evident purpose of avoiding intestacy as to any part of the decedent's estate.

2. Cases in which the will, in addition to the disputed bequest, also contained a residuary clause, to which the court has given effect by applying the principle of *ejusdem generis* to the general words, because to hold that the latter were to have their largest meaning would render the residuary provisions inoperative by leaving no property on which it could take effect.

3. Cases in which the technical rule, that general words, preceded or followed by special words, are to be limited to things *ejusdem generis*, has been applied without special regard to the intent of the testator. This principle of decision will probably not be followed by any court of the present day.

4. Cases in which the courts have endeavored, within well recognized general principles of construction, but otherwise unhampered by strictly technical

rules, to ascertain from the whole instrument the intention of the testator and to give it effect.

Omitting from the third subdivision of the present will such parts thereof as are not material to this discussion, it will read as follows, namely :

"I give, devise and bequeath to my son Mortimer F. Reynolds my property in Rochester, known as Reynolds Arcade, including also East Arcade with all the lands, buildings and appurtenances thereunto belonging, and all the furniture and personal property in and upon same or in any manner connected therewith." Under the first principle, deduced from the cases, and above stated, this provision, standing alone, would clearly carry all personal property found in and upon the Arcade, at the testator's death. There is, however, a residuary clause in this will, viz. : the fifth subdivision thereof, which disposes of personal property, and the case will therefore fall under the second or fourth of the classes above made. It appears from the inventory that, with the exception of bad and doubtful accounts and advances charged on his books, the testator left no personal property of any value, besides what was in and upon the Arcade, at his death, and had usually been kept there for a long time prior thereto ; and what was in use at his dwelling-house and which was given to his wife for life by the second subdivision of the will.

The last paragraph of said subdivision five substantially directs that this personal property at the homestead should be sold, after the death of the wife of testator, and the proceeds equally divided between his two granddaughters. The first part of this resid-

uary clause devises and bequeaths all the rest, residue and remainder of the estate, both real and personal to the executor, in trust to sell and use the proceeds; first, to equalize certain advancements charged on the testator's books and afterwards to divide the remaining fund equally between his two granddaughters aforesaid. It, therefore, plainly appears from these residuary provisions that the testator supposed there would be personal property remaining undisposed of, after setting aside that which is bequeathed by the second and third clauses of his will, and, to provide for the distribution of that unbequeathed personalty, he gave the specific directions, contained in said subdivision five.

I think, therefore from the whole will, it was apparently the intention of the testator to give to his son, with the Arcade, all the furniture and other personal property connected with the same and suitable and appropriate for use therewith. And I must hold that the words "personal property" are to be restricted in their meaning, accordingly. The executor, therefore, will take under the bequest in the third subdivision of the will the property referred to in the inventory as in Arcade, inner office, valued at \$521; in Arcade, outer office, valued at \$240.50; in Arcade in cellar, valued at \$56; in Arcade in shop, valued at \$166; in Arcade, scattering, valued at \$80; while the money, evidences of deposit, securities, choses in action, and other personal property, referred to in the inventory as in and upon the Arcade, will be distributable in accordance with the directions of the fifth subdivision of the will.

I do not think that any special stress is to be put

upon the fact above referred to, that certain articles of personal property are excepted out of the operation of the bequest in the second clause, while that in the third clause is not so restricted. It may well be, that the learned judge who drew the will added the words "other than money, choses in action, and securities," in the second clause to enlarge the meaning of the preceding words "all other personal property," in accordance with the decision in *Hotham v. Sutton* (15 *Vesey*, 319). If the bequest in the second clause had ended with the words "personal property," no plainer case could have been found for the application of the rule that general words in the bequest following a specific enumeration of articles in a particular locality will be confined to articles *ejusdem generis* (*Gibbs v. Lawrence*, 30 *L. J., N. S. [Eq.]*, 170; *Beardsley v. Hotchkiss*, 96 *N. Y.*, 212). It may be further said that if it was intended by the words, "personal property," in the third clause, to carry all property of every kind and nature in and upon the Arcade, answering the description of personalty, a strict and accurate use of language would not have required the insertion therein of the word "furniture," for furniture is personal property always, and would be effectually bequeathed by the general words. The property not herein held to be covered by the bequest to the executor in said third clause of the will must, therefore, be accounted for in this proceeding. Further hearing may be had on five days' notice to parties interested.



MONROE COUNTY.—HON. J. A. ADLINGTON, SURROGATE.—May, 1887.

WORDEN v. VAN GIESON.

*In the matter of the application for probate of a paper propounded as the will of ELLEN VAN GIESON, deceased.*

The paper propounded as decedent's will, and which purported to have been executed by making a cross-mark, was accompanied by a full attestation clause, and was witnessed by the draftsman, since deceased, and another whose memory, as to the circumstances attending the publication, was a blank. No other evidence being adduced to show the making of the mark by decedent,—

*Held*, that probate must be refused, for lack of proof.

*It seems*, that proof of the making of such mark by decedent would have been "proof of the handwriting of the testator," within the meaning of Code Civ. Pro., § 2620.

Matter of Reynolds, 4 Dem., 68—followed.

Matter of Walsh, 1 Tucker, 132—criticized.

PETITION for the probate of will. The facts are fully stated in the opinion.

P. B. HALLET, *for proponents*.

JOHN DESMOND, *for contestants*.

THE SURROGATE.—This is a proceeding for the probate of an instrument purporting to be the last will and testament of the above-named decedent, propounded by Gilbert Van Gieson and Ellen Jane Van Gieson, who are named as executors in the said instrument. The probate is opposed by Martha Worden and

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Mary Vansice, daughters of the decedent, on the ground that said alleged will was not executed according to law.

The alleged will is dated May 5th, 1875, and appears to be signed at the end by the decedent by mark, in this wise :

Witness to mark,  
V. M. Smith.

<sup>her</sup>  
Ellen + Van Gieson.  
<sub>mark</sub>

There follows a full attestation clause, reciting the observance of all the statutory forms in the execution of the instrument, and this clause is subscribed by Leman S. Wolcott and Vincent M. Smith as attesting witnesses.

Mr. Smith was an attorney of good reputation and long experience, and the written portion of the will is in his handwriting. He superintended the execution of this instrument, and it is probable that his testimony, if he were alive, would fully establish the due and formal execution of this will in every particular. Mr. Smith, however, died before Mrs. Van Gieson, and the only person now living, who can give any testimony on the subject of the execution of this instrument, is the other subscribing witness, Leman S. Wolcott. The transaction took place twelve years ago, Mr. Wolcott is now sixty-seven years of age, and is one of those unfortunate persons afflicted, either with a seriously defective memory, or a strong inclination to appear of that condition ; and it is difficult to tell from his testimony what did occur at the time of the execution of the alleged will. There is a strong presumption that this instrument was properly executed, arising from

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the fact that a lawyer thoroughly familiar with the statutory requirements superintended the proceedings, and from the further fact that there is a full attestation clause signed by the attesting witnesses, which clause was probably read aloud by Mr. Smith in the hearing of Mrs. Van Gieson and Mr. Walcott, just before it was signed by the two men as attesting witnesses (*Peck v. Cary*, 27 *N. Y.*, 9; *Matter of Cottrell*, 95 *N. Y.*, 339; *Brown v. Clark*, 77 *N. Y.*, 369; *Radley v. Kuhn*, 28 *Hun*, 577).

Notwithstanding this presumption in favor of the alleged will, there seems to be an insuperable statutory difficulty in the way of its probate, aside from the uncertainty as to the facts. Section 2618 of the Code of Civil Procedure, requires the examination of at least *two* of the subscribing witnesses before the admission of a written will to probate, if so many are within the State and competent to testify. When death, absence from the State, lunacy, or other incompetency, has been shown, § 2620 then permits the will to be established upon proof of the *handwriting* of the testator, *and* of the subscribing witnesses, *and also* of such other circumstances as would be sufficient to prove the will upon the trial of an action.

Under the provisions of the last mentioned section, there would usually be little difficulty in establishing the due execution of a will which had been signed by the testator in his own handwriting, and attested by the subscribing witnesses, in like manner. In case of the death or forgetfulness of the witnesses, persons could readily be found, familiar with the signature of the testator and the attesting witnesses, and by whom

such signature can be proved; or resort could be had to comparison of the handwriting with other specimens known to be genuine. When, however, the testator has signed by mark and one or more of the subscribing witnesses are dead, or have forgotten the occurrence, serious difficulty arises, on attempting to probate the alleged will, from the fact that a mark has no distinctive character and does not permit of identification.

If other persons than the subscribing witnesses were present at the execution of the instrument, and actually saw the decedent make his mark, and can remember and testify to the fact upon the trial, the will may still be saved; but, under the circumstances of the present case, I do not see but that I am compelled, by the statutes above referred to, to deny probate to this instrument. Similar decisions have been made by other Surrogates (*Matter of Reynolds*, 4 *Dem.*, 68; *Matter of Walsh*, 1 *Tuck.*, 132). While the latter case was correctly decided on the proofs before the learned Surrogate, and is very like the present one, yet I do not approve of the doctrine of the opinion that "a will subscribed by a mark . . . cannot be proven at all, if one of the witnesses cannot be produced." I have stated above that, in my opinion, probate may be had if other persons, who were present, can testify to seeing the mark made, and the other circumstances attending the execution can be established. In this position I am confirmed by the decision in *Matter of Simpson* (2 *Redf.*, 29).

While therefore, the due execution of this instrument is probable, I am constrained by lack of legal

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proof to deny its probate. Decree may be entered on two days' notice.

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MONROE COUNTY.—HON. J. A. ADLINGTON, SURROGATE.—January, 1888.

## LANEY v. LANEY.

*In the matter of the estate of JAMES LANEY, deceased.*

A provision in a partnership agreement, that the death of a member shall not work a dissolution, but that the business shall continue and be conducted by the survivors until a day specified, is invalid and abortive,—it being beyond the competency of the parties thus to modify or abrogate the law of wills and intestate distribution.

MOTION to confirm referee's report, on judicial settlement of account of Enos G. Laney, administrator of decedent's estate. Decedent, the accounting party and one Barker, in February, 1883, executed an agreement of partnership providing that the same should continue for seven years, and not be dissolved by the death of any partner, but be carried on by the survivors, and the sum of \$2,000, be annually deducted from the deceased partner's share of the profits.

The administrator, on filing his account, assumed the validity of the agreement, according to which the partnership would continue until 1890, and that he was entitled to retain the decedent's money in the business, and account for the net income only, after

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deducting \$2,000 per annum. To this the widow and children objected, contending that the death terminated the partnership, and that, eighteen months having expired since the death, the principal and income should be distributed.

H. L. BARKER, *and* THEO. BACON, *for administrator.*

J. & Q. VAN VOORHIS, *for widow.*

F. M. GOFF, *special guardian.*

THE SURROGATE.—The principal question in this proceeding is whether or not the care, custody, management and control of an *intestate's* property can be given for a number of years after his death to such decedent's surviving partners, by a clause in the co-partnership agreement providing that the death of a member of the firm shall not work its dissolution, but that the partnership business shall nevertheless continue and be conducted by the survivors until a day specified in said agreement. The time during which, under this present agreement, the *intestate's* personal representatives will be excluded from all power over his personalty is about three years.

I am inclined to answer the above question in the negative. If a man wishes to direct the control and management of his estate after death, he can do so, within certain prescribed limits by making his will, according to law. If he dies *intestate*, he is held to prefer to have his estate managed and settled according to the statutes governing the distribution of *intestates'* estates.

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On this subject, CHURCH, Ch. J., says, in *Ross v. Hardin* (79 *N. Y.*, 91): "It is very clear, I think, that a person cannot by contract supersede, or contravene, the laws in respect to the management and devolution of property in case of intestacy. The statute has provided a mode of doing this by will, but the requirements of the statute must be complied with." In *Nat. Bank of Newburgh v. Bigler* (83 *N. Y.*, 57), the Court of Appeals, while declining to decide as to the scope or validity of such a provision, says: "The contract was certainly intended, in some degree, to supplant and modify the legal rules which restrain the action of the survivor." See, also, *Gilman v. McArdle* (65 *How. Pr.*, 337). Some of the text book writers assert that such an agreement is valid, but, so far as I have been able to discover, they are not supported by the decision of any court on a case in point.

Furthermore, the effect of this agreement, if valid, is to suspend the absolute ownership of the larger part of the decedent's personal property for a definite period of time, in a way which would be void if attempted to be done by will (*Stewart v. Hamilton*, 37 *Hun*, 19, 21; *Moore v. Moore*, 47 *Barb.*, 257, 260). If such an agreement is valid for three years after death, it must be equally so for one hundred years, and thus by partnership agreements, appearing valid on their face, the whole law relating to wills and trusts could be circumvented and rendered practically of no effect.

While I do not agree with the referee, as to some of his conclusions in the proceeding, I think the re-

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sult at which he arrives is fair and just, and therefore confirm his report.

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MONROE COUNTY.—HON. J. A. ADLINGTON, SURROGATE.—April, 1888.

RAMSDELL v. VIELE.

*In the matter of the application for probate of a paper propounded as the will of LOUISA M. RAMSDELL, deceased.*

Under Code Civ. Pro., § 2623, providing that a will must be admitted to probate, on application, "if it appears to the Surrogate" that the same was duly executed, and "that the testator, at the time of executing it, was in all respects competent to make a will," . . . . . a proponent must show affirmatively, before resting his case, that the testator was of sound mind.

The proponents, on applying for probate of a will, called but one witness, a stranger to decedent, who was the only survivor of the subscribing witnesses, and who, after testifying to the formalities of execution, and that decedent understood the provisions of the instrument, stated that she was of unsound mind at the time; and then rested. Thereupon contestants moved to dismiss the proceedings, for failure to prove mental competency.—

*Held*, that the motion must prevail.

DECEDENT died at Rochester, N. Y., on January 17th, 1888, leaving two adult children surviving her, both of whom were insane. Her alleged will dated July 16th, 1883, presented for probate by Platt B. Viele and another, executors therein named, directed nearly the whole of her estate, amounting to over \$100,000, to be expended in the erection of a tomb



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for herself and family. The application was contested by the committees of the insane children, on the ground of unsoundness of mind on the part of decedent. The sole surviving witness to the will was Mr. Camp, and he was the only person examined on the trial. He testified to the conversation and circumstances attending the drawing and execution of the will, and that it was executed according to law. He also stated that the decedent understood the contents and provisions of the paper, but that her mind was unsound at the time she executed it.

The proponents rested on this testimony. The contestants then moved to dismiss the proceedings for failure to prove mental competency.

JOHN M. DAVY, *for proponents.*

JOHN VAN VOORHIS, *for contestants.*

THE SURROGATE.—This is a motion to dismiss the proceedings of the proponents, for failure to prove the mental competency of the alleged testatrix. The motion was first made at the close of proponents' case, and was denied off-hand, without examination of the testimony given on the hearing, and with the expectation that the production of witnesses on both sides would follow; but the fact that counsel appeared between the time of the informal argument and the day fixed for taking testimony, and requested that further arguments be heard and that briefs might be submitted, leads me to infer that the parties wish the whole matter disposed of by the decision of this motion.

The motion rests chiefly upon technical grounds, and relates to forms of procedure rather than to the real merits of the issue formed by the pleadings herein, which issue is the sanity of the decedent. No witness, from the city in which Mrs. Ramsdell had so long lived, and in which she had successfully transacted the business of her large estate, has been called to give evidence as to the competency, or incompetency, of the deceased to make a will. The parties to this contest have preferred to subordinate the principal question to a controversy over the order of proofs and methods of procedure; and the only person examined in the proceeding is the survivor of two attesting witnesses, who, at the time of the execution of the will, was a stranger to the decedent, and entirely unacquainted with her habits, character, feelings and capabilities. It is needless to say that such testimony does not furnish a satisfactory basis for a fair and an intelligent judgment on the main question in issue, and that, in deciding this motion, I do not pass upon that question, except as it is incidentally involved in the technical issue raised by this motion.

The proponents' position on the motion is, that they are only required, in the first instance, to prove the formal execution of the will, and that, such proof being made, a legal presumption of the sanity of the testator then arises, on which proponents may safely rest until the contestants have given evidence tending to show the insanity of such testator; to which evidence the proponents may then oppose such evidence as they may have, in support of decedent's soundness of mind. The contestants insist that this position is

incorrect, and that the proponents, before resting, must prove, *prima facie*, not only the formal execution of the will, but also the decedent's soundness of mind, and freedom from restraint; and that the necessity for furnishing such proof is the stronger in the present case from the fact, that the only witness sworn testifies that, in his opinion, the decedent was of unsound mind at the time of executing the alleged will.

This precise point has seldom been discussed in the reported decisions of this State. The usual practice in will contests, involving the sanity of the testator, in our Surrogates' courts, is for the proponent to prove the formal execution of the will, and to show *prima facie*, by the attesting witnesses, the decedent's age, mental competency, and freedom from restraint. The contestant then offers his evidence in support of his allegations of unsoundness of mind, and the proponent closes with testimony in reply, and in support of the allegations which he is bound to maintain. On the whole issue, made as just stated, the courts of this State have frequently declared that the burden of proving a decedent's unsoundness of mind is on him who asserts the existence of that unnatural condition. This doctrine is formulated in *Delafield v. Parish* (25 N. Y., 97), and has been often reiterated by all of our courts.

It must be observed, however, that this is a very different question from the one here presented; for the contestants have as yet offered no testimony, and maintain that the proponents must fail for the lack of proof of a material fact. This distinction is clearly drawn, in the opinion of the General Term of the Third

Department, in *Harper v. Harper* (1 *T. & C.*, 355), in which the court says: "It is the established law of this State that the legal presumption, to begin with, is that every man is *compos mentis*, and the burden of proof that he is *non compos mentis*, rests on the party who alleges that unnatural condition of mind existing in the testator. *But it is also the rule that, in the first instance, the party propounding the will must prove the mental capacity of the testator.*" In *Delafield v. Parish* (25 *N. Y.*, 34), Judge DAVIES also says: "The party propounding the will is bound to prove to the satisfaction of the court that the paper in question does declare the will of the deceased, and that the supposed testator was, at the time of making and publishing the document, propounded as his will, of sound and disposing mind and memory." In *Kingsley v. Blanchard* (66 *Barb.*, 317, 322), a case in which only the subscribing witnesses to the will were sworn, and where neither of them stated whether or not the testatrix was of sound mind, after some discussion of the testimony as to the execution of the will, and a quotation of the provisions of the Revised Statutes regulating the probate of wills, the General Term say: "The question then is, whether the testatrix is shown to have been a person of sound mind, within the meaning of these terms, when applied to testamentary dispositions of property. *This fact must be proved; and the burden of its proof rests on the party propounding the will.*" If the legislature had intended (by the provisions of the statutes above mentioned), that the Surrogate might be satisfied with presumptive proof, it would never have

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been guilty of the folly of requiring a fact to be proved which the law presumed to exist."

Again, in *Miller v. White* (5 *Redf.*, 321), it is said: "The burden of proving unsoundness of mind is on the contestant, but it is expected of the party offering a will for probate that he will examine the subscribing witnesses as to the condition of the testator's mind." In the *Matter of Cottrell* (95 *N. Y.*, 336), the Court of Appeals say: "The proponent has the affirmative of the issue, and if he fails to convince the trial court, by satisfactory evidence, that each and every condition required to make a good execution of a will has been complied with, he will necessarily fail in establishing such will." In the only recent work on Surrogate's Practice in this State (*Redf. Surr. Prac.*, 3d ed., 216), the matter is put as follows: "On the question of probate, the orderly and proper course for the introduction of evidence is, first, to prove the requisite formalities attending the execution, publication and attestation of the will, and then show that the testator was, at the time, of the proper age and mental soundness, and was not unduly influenced in the testamentary act." The necessity for observing this order of proof is now emphasized by the provisions of the Code of Civil Procedure, §§ 2622, 2623. As to the former, Surrogate ROLLINS says, in *Cooper v. Benedict* (3 *Dem.*, 136), that it has lent a new sanction to the doctrine, enunciated in *Delafield v. Parish* (*supra*), that the proponent of a will must prove to the satisfaction of the court that the supposed testator, at the time of the execution of the alleged will, was of sound and disposing mind and memory.

Section 2623, and the subject here under consideration, are discussed in *Matter of Freeman* (46 *Hun*, 467, 468), from which I quote: "It is claimed by the respondents, who were the proponents, that, the formal execution of the will having been established, it was unnecessary for the proponents to give any evidence of mental capacity of the testatrix to make a will; that the contestants had the burden of proof of showing incapacity, and, as they gave no evidence at all, the Surrogate might and should presume the existence of mental capacity, and admit the will to probate. I think this will not answer. The Code of Civil Procedure provides (§ 2623): 'If it appears to the Surrogate that the will was duly executed, and that the testator, at the time of executing it, was in all respects competent to make a will, and not under restraint it must be admitted to probate.'"

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The same principle has been laid down in numerous cases, decided by the courts of last resort, in many other leading States of the Union (*Brooks v. Barrett*, 7 *Pick.*, 94, 98; *Crowninshield v. Crowninshield*, 2 *Gray*, 524, 532; *Gerrish v. Nason*, 22 *Me.*, 438, 441; *Perkins v. Perkins*, 39 *N. H.*, 168; *Taff v. Hosmer*, 14 *Mich.*, 309; *Aikin v. Weckerly*, 19 *Mich.*, 482, 502, 503; *Comstock v. Hadlyme*, 8 *Conn.*, 261; *Renn v. Samos*, 33 *Texas*, 760; *Williams v. Robinson*, 42 *Vt.*, 658).

I conclude, therefore, that the law is that the proponents, in addition to proof of the due execution of the will, must show affirmatively, before resting their case, that the testator was of sound mind and free

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from undue influence, at the time of the alleged testamentary transaction. The necessary *prima facie* proof may be, and usually is, furnished by the attesting witnesses to the will; but, if they express no opinion, or an unfavorable one, the fact of insanity may still be presumptively established by the testimony of the subscribing witnesses, or of other persons, to facts and circumstances from which capacity may be fairly and legitimately inferred (*Kingsley v. Blanchard*, 66 *Barb.*, 322, 323).

In the present proceeding, after a careful examination of the testimony given by the single witness examined, I cannot say that I am satisfied as to the competency of the decedent at the time of the alleged testamentary act. It is true that the witness says that Mrs. Ramsdell conversed intelligently, and understood the contents of the instrument, and the nature of the transaction, but he says further that he did not think her mind was sound. He says: "Her natural affections seemed to be perverted. Instead of having that feeling of kindness and consideration for her children that a mother would naturally have, she seemed indifferent to them and to dislike them. Her natural affections were blunted. She seemed to have no conception of the fact that she was owing certain duties to those children, or that they were objects of her bounty. That conclusion I arrived at, after talking with Mrs. Ramsdell for an hour. Our conversation left the impression on my mind that her mind was not right. She didn't seem to comprehend the proper objects of her bounty. A portion of her conversation impressed me as rational and a portion as irrational."

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M'CREEDY V. GARBUTT.

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In view of all this testimony standing without contradiction, or attempted extenuation, I must allow the contestants' motion to prevail. No question was raised as to whether or not the proponents' proofs, of the formal execution of the alleged will, comply with the requirements of § 2619 of the Code of Civil Procedure, and I, therefore, do not discuss that subject.

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MONROE COUNTY.—HON. J. A. ADLINGTON, SURROGATE.—April, 1888.

McCREEDY v. GARBUTT.

*In the matter of the estate of ROBERT GRATTON deceased.*

Declarations of kinship, sought to be introduced in evidence, as a basis of a demand for the grant of letters of administration of a decedent's estate, to the alleged relative, must come within the rules, which require the declarant to have been a relative, since deceased, who knew or professed to know the facts stated from connection or acquaintance with the family, and whose relationship appears from evidence *aliunde*.

Though evidence of reputation is competent, the testimony, in this regard, of witnesses not acquainted with the facts, and whose information is not derived from those connected or acquainted with the family, is hearsay and incompetent.

APPLICATION for revocation of letters of administration of decedent's estate. The facts appear in the opinion.

JOHN M. DUNNING, *for petitioner*.



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M'CREEDY V. GARBUTT.

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SELDEN S. BROWN, *for administrator.*

THE SURROGATE.—Robert Gratton died on or about March 25th, 1888, in Wheatland, in this county, where he had lived for many years. He left no wife or descendants. On March 27th, 1888, letters of administration were duly issued out of this court to Philip Garbutt, a creditor, on a petition showing the necessary jurisdictional facts, and alleging, among other things, that said Gratton's only next of kin were sisters and a brother living in Ireland.

A few days later, Margaret McCreedy filed a petition alleging that she and her brother, Thomas Smart, were second cousins of said Gratton, and his only next of kin in the United States. She asked for the issue of letters of administration to herself, and the revocation of those previously issued to Mr. Garbutt. Citation was issued against the latter only. A renunciation by Thomas Smart was filed, and an answer by Mr. Garbutt putting in issue the relationship of Mrs. McCreedy to Gratton. Considerable testimony was given, on behalf of the petitioner, for the apparent purpose of establishing a distant kinship between Mrs. McCreedy and the deceased Gratton. The witnesses had no personal knowledge of the matter in controversy, and their testimony is only competent and material so far as it conforms to the rules of evidence which admit hearsay to establish relationship. These rules are clearly stated by numerous authorities.

To render evidence of this character competent, it must appear that the declarant or source of the witness' information was a deceased member of the family, that is to say *legally* related by blood or

marriage to the family whose history the fact concerns. Therefore, the witness must name the source of information, and show affirmatively, that it was a relative, or connection, who is since deceased. And the declarant's relationship . . . . . must be established by other evidence than the declarations themselves (1 Taylor on Ev., ch. 9, §§ 635, 640, 641; Abb. Trial Ev., 91, 92).

Kinship may also be proved by general reputation in the family, upon the testimony of a witness whose knowledge of that repute, and of the conduct of members towards each other is that which usually exists among intimate acquaintances.

But the testimony of witnesses who are not connected with the family, know nothing personally of the facts . . . . . and have not derived their information from such persons as had any connection, or particular acquaintance with the family, but can only state loose hearsay from unknown sources, is not sufficient (Abb. Trial Ev., 94). Unless it appears that the declarant is dead, and that he knew or professed to know, the facts he stated from some connection or acquaintance of the family, the declarations are entitled to no weight (Jackson v. Browner, 18 *Johns.*, 39; 1 Greenleaf on Ev., § 103).

Within the principles above referred to, the evidence in this case wholly fails to establish any relationship between the petitioner and the decedent. It is true, the witnesses say there was some relationship. But the bald assertion of relationship does not prove its existence. It must be proved to exist by legitimate evidence (Armstrong v. McDonald, 10 *Barb.*,

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300). The petitioner's own testimony is confused, contradictory and unsatisfactory. She gives a number of different statements of the degree of kinship which she claims to exist. It is plainly evident that, during Gratton's life she never asserted any blood relationship, and that he never admitted any. After his death, she told Mr. Bennett that Gratton had no relatives in this country. Her brother, Thomas Smart, appears to be an old, and feeble-minded man, and his testimony is of little weight.

I think, therefore, that this application must be denied.

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CATTARAUGUS COUNTY.—HON. ALFRED SPRING,  
SUBROGATE.—December, 1887.

HITCHCOCK v. WILTSIE.\*

*In the matter of the estate of JAMES WILTSIE, deceased.*

In a special proceeding instituted by a legatee under Code Civ. Pro., § 2717, to procure payment of her legacy, the executors having filed an account wherein the widow of decedent, executrix, made a personal claim against the estate—it appeared that testator and his wife, the claimant, had for years resided together in the village of A., where the former had carried on the business of note brokerage and money lending, including the buying and selling of mortgages and other securities. The claim in question was for \$1,000 which the widow contended represented money belonging to her, which decedent had invested in a mortgage given to himself as mortgagee. It appeared

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\* Affirmed at General Term.

## HITCHCOCK V. WILTSIE.

that decedent had admitted the absorption of funds belonging to claimant in his own business, and had expressed a desire to protect the rights of his wife, in respect to moneys belonging to her and handled by him; that no demand had ever been made upon him for a settlement; and that within six years he had assigned to the claimant a bond and mortgage to apply upon his obligations to her for moneys received by him as her agent.—*Held*,

1. That, although the mere fact of payment to decedent of moneys of claimant was not conclusive in favor of her demand against the estate, the corroborative evidence was ample to support her claim, and that the same had not been satisfied.
2. That the defence of the statute of limitations was negatived by the circumstance that no demand had been made upon decedent, and that payment or delivery had been made upon account.

AMY HITCHCOCK, a legatee under decedent's will, having filed a petition, under Code Civ. Pro., § 2717, for the payment of her legacy, a citation was issued, at the return whereof all parties interested appeared and the executors filed their account. The widow, who was also executrix, presented a personal claim against the estate of her husband and testator, the facts relating to which are sufficiently set forth in the opinion.

CARY & RUMSEY, for *Malvina Wiltzie*.

CORBIN & JEWELL, for *Amy Hitchcock*.

THE SURROGATE.—The claimant, who was Malvina Huntley by name, married the testator in 1860. About a month prior to the marriage, testator conveyed to her a farm situate in the town of Allegany, in this county; on April 1st, 1867, claimant sold this farm to one Leonard Sprague for \$4,400, of which 1,000 were paid in cash to her husband, James Wiltzie, and \$3,400 were secured by a purchase-money mortgage, payable to Mrs. Wiltzie.

## HITCHCOCK V. WILTSIE.

This sum of \$1,000 was invested by Mr. Wiltsie in a real estate mortgage against Nathan A. Dye, bearing date April 4th, 1867, and payable to Wiltsie himself, as mortgagee. At the time this was made, Mr. Wiltsie stated that it was in pursuance of an arrangement with his wife, whereby he was to handle her money, and as he was engaged in the business of buying commercial paper and other securities, purchasing them at a discount, he was to have whatever he made in the way of a bonus, and was to assign to her mortgages whenever she demanded it, in payment of the moneys so received belonging to her. Payments were made upon the Sprague mortgage from time to time, but they were invariably paid to Mr. Wiltsie, and by him invested for his benefit, and evidently under the arrangement mentioned.

In 1875, Mrs. Wiltsie received, from Sebastian Weiler and another, a mortgage of \$515.50, which, while it is unexplained, is embodied in the account filed by her in this proceeding as a credit upon her claim. In November, 1880, Mr. Wiltsie caused to be assigned to his wife a mortgage for \$636 against one Elsie Schoonoven, explicitly stating it was to apply on the account growing out of the payments made to him on the Sprague mortgage. In September, 1877, the Sprague farm was sold by the then owner, and mortgages were given by the purchasers directly to Mrs. Wiltsie, but the payments made by these new mortgagors, as well as those made on the Schoonoven and Weiler mortgages, were uniformly paid to the testator.

In 1872, Mrs. Wiltsie obtained, upon lands in Allegany county, a mortgage against one Henry Huntley,

for the sum of \$1,670. The proof is silent as to what source the money came from, that was invested in this mortgage, yet the claimant's chief witness, Mr. Willard, and who was familiar with the financial standing of the Wiltsies, testifies that she had no property whatever, except what came from the Sprague farm, so it is a fair presumption that this Huntley mortgage was the outgrowth of this farm sale. This is an especially irresistible inference, in view of the fact that the claimant was a witness in her own behalf, yet vouchsafed no explanation of this mortgage.

The testator talked quite freely with his proposed executor, Willard, as to this indebtedness to his wife at the time of the giving of the Dye mortgage, as above stated, and casually, from time to time after this, and again two or three years ago, when Mr. Willard was critically sick. At these talks, Mr. Wiltsie was free to admit the absorption of these payments on the Sprague sale in his own business, and in the last conversation seemed to be anxious that his wife's rights, on account of these payments to him, should be carefully protected.

Counsel for contestant strenuously objects to the allowance of this claim, principally upon two grounds:

*First.* It is urged, with much adroitness, that the fact of the payment to Wiltsie of these several sums on these mortgages is not sufficient to uphold the claimant's account against his estate: that he was simply her cashier, or secretary and that the burden is upon her to show, by unmistakable proof, that this money was not received by her.

Did the claimant's case depend wholly upon the

## HITCHCOCK V. WILTSIE.

isolated fact that these moneys were received by her husband, the position of contestant's counsel would be a tenable one. Such a transaction in and of itself would be no more than a husband, especially a business man, would be likely to do for his wife. But in this case, there are other circumstances which serve to characterize the transaction. The \$1,000 paid in cash at the time of the sale of the farm, was invested by Wiltzie in a mortgage payable to himself, and that investment was accompanied with the explicit statement, that he was to handle her money in order that he might make the excess above the legal interest, which he seemed confident he could obtain. This temptation to the money shaver was too strong to be resisted. Again, at the time of the assignment of the Schoonhoven mortgage, and at the times of his other talks with Willard, he admitted his liability to his wife, and his desire and intention to transfer to her securities, and protect her in some other way, on account of his use of these moneys. The testator and his wife resided in the village of Allegany, and their principal business for many years seems to have been loaning money, buying mortgages and other securities in that vicinity. In a rural township, a man's business is known to his neighbors, and is the subject of corner-grocery and fireside talk, so that, if Mrs. Wiltzie had been personally taking securities in her own name, other than those presented on this trial, that fact would have been ascertained by the vigilant counsel for the contestant. If the money paid from time to time had been handed over to her by her husband it

is hardly probable she would have hoarded it in specie; the Wiltsies were too thrifty for that.

These facts are all corroborative of claimant's position, and establish clearly to my mind that these moneys were used by Mr. Wiltsie with the assent of his wife but with the mutual expectation that he was to transfer to her securities in payment therefor whenever she might require it.

*Second.* But it is claimed her demands are barred by the statute of limitations.

1. These moneys were not loaned to Wiltsie. He was the custodian of her funds, her depository, and was to make over to her mortgages when she demanded it done. He said he would pay this when she demanded—that he would account to her for the principal and interest, and what he could make, over and above that, he should have. Under this definite arrangement, Wiltsie could not have been compelled to account to his wife, or assign mortgages to her in liquidation of her claim until a demand had been made of him therefor, and, *a fortiori*, the statute would not commence to run against her, until he had refused to perform his part of the agreement (*Boughton v. Flint*, 74 *N. Y.*, 476; *Payne v. Gardiner*, 29 *N. Y.*, 146; *Smiley v. Fry*, 100 *N. Y.*, 262; *Howell v. Adams*, 68 *N. Y.*, 314; *Munger v. Albany City Nat. Bk.*, 85 *N. Y.*, 580, 587).

It is like the rule that has always obtained, as to a deposit with a bank; a demand is necessary before a right of recovery accrues, and hence the statute of limitations does not commence to run until after a refusal to pay has been made by the bailee (*Story on*



## HITCHCOCK V. WILTSIE.

Bailments, § 88; *Downs v. The Phoenix Bank*, 6 *Hill*, 297; *Pardee v. Fish*, 60 *N. Y.*, 265; *Bank of N. A. v. Merchants Bk.*, 91 *id.*, 106).

2. But aside from the rule above invoked, the statute of limitations would not be available to the contestant. In 1880, the Schoonhoven mortgage was caused to be transferred to Mrs. Wiltsie by testator, expressly to apply in payment of the moneys he had taken under the arrangement stated. This transfer or delivery of property in payment of this specific indebtedness operated the same as a cash payment and revived the debt or prevented the running of the statute (*Smith v. Ryan* 66 *N. Y.*, 352; *Harper v. Fairley*, 53 *N. Y.*, 442; *Butts v. Perkins*, 41 *Barb.*, 509; *Sibley v. Lumbert*, 30 *Me.*, 253).

Nor does the fact that the satisfactions of these mortgages were executed by claimant militate in any way against her. Even if the money had been taken by testator, in pursuance of a written contract under seal, to be invested by him for her benefit, it would still require the discharge of each mortgage to be executed by her. The mortgages were payable to her, and the record thereof could only be cleared by a satisfaction made by her. The retention and investment of the money by him was in consequence of an agreement wholly independent of the mortgages, and their satisfaction had not the slightest bearing upon this arrangement between the testator and claimant.

A decree will be entered, establishing the accounts of claimant, computing interest on the several payments made to Mr. Wiltsie at seven per centum until January 1st, 1880, and at six per centum since that

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time. The estate must be credited with the Huntley mortgage and the other credits set forth in the account, with interest to be computed upon the same basis as the accounts chargeable to the estate. Formal findings of fact, in accordance herewith, will be filed to accompany the decree, and the costs will then be adjusted.

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CATTARAUGUS COUNTY.—HON. ALFRED SPRING,  
SURROGATE.—July, 1888.

## STEVENS v. STEVENS.

*In the matter of the probate of the will of SARAH A.  
STEVENS, deceased.*

After her will had been duly and completely executed and published, testatrix informed the draftsman that she wished to bequeath to one J. her household furniture, and other articles then and there specified, and a bureau to S. The draftsman wrote these directions on a slip of paper, stating that he would paste the latter in the will, on reaching home. When produced for probate, the will presented a cross-section into which the post-testamentary slip had been inserted by the draftsman,—there having been no re-execution or republication.—

*Held*, that the instrument should be admitted, as executed, excluding the interpolated clause.

Sisters of Charity v. Kelly, 67 N. Y., 415; Matter of O'Neil, 91 N. Y., 516—distinguished.

APPLICATION for probate of decedent's will, made by Russell Stevens, executor therein named; opposed by William Stevens and another, next of kin.

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STEVENS V. STEVENS.

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J. G. JOHNSON, *for proponents.*

T. H. DOWD, *for contestant.*

THE SURROGATE.—The testatrix in this case was of sufficient mental capacity at the time of the execution of the will propounded; she was under no restraint, and the statutory formalities were well complied with in the execution of the will. The point of the controversy is this: After the testatrix had signed the will, fully understanding all of its contents and expressing her assent thereto, in fact after the will had been fully made and executed, the testatrix stated to the scrivener that her household furniture, clothing and bedding, she wished to bequeath to Jane Myers, except a bureau which she was to give to Edward Stevens. The draftsman accordingly wrote these directions on a separate piece of paper, read what he had written to testatrix, and stated to her he would paste that in the will when he reached home. It was produced upon the trial with this interpolated clause pasted upon the paper propounded—the instrument having been cut into, so as to permit that clause to be inserted in the proper place as the seventh subdivision of the will. There was no re-publication of the will after that clause had been written; it was not in any way attached to the will at the time of the execution, nor in the presence of testatrix or the witnesses, nor was any force given to it as a testamentary provision by what there occurred.

The proponent offers the will for probate exclusive of this interjected portion.

This controversy is another illustration of the folly

of those unfamiliar with the indispensable formalities of the statute as to the execution of wills attempting to supervise their attestation. However, notwithstanding this blundering by the draftsman, I do not think the will was vitiated. It was fully and formally executed prior to the conversation in reference to the disposition of the property contained in this inserted clause. The provisions of the will had been dictated to the draftsman by the testatrix, had been written as she requested, and had been carefully read to her and approved of by her. It was a completed thing when signed by the attesting witnesses. The jugglery by which the will was sought to be changed was like an unsuccessful attempt to make a codicil to a will. The original will is not rendered invalid by a failure to have the codicil properly executed. If this transaction had occurred on the day succeeding the execution of the will it would not be claimed that it could have a retroactive effect by nullifying the will.

The same is true in any case, however brief the time may be, intervening the completion of the will and the attempted alteration. The pivotal point in such cases must be to ascertain whether or not there was an actual complete execution of the will. If so, any subsequent conversation or conduct by the testatrix cannot vitiate it unless it is tantamount to a revocation, codicil, or destruction of the will. See *Brady v. McCrosson* (5 *Redf.*, 431).

The cases of *Sisters of Charity v. Kelly* (67 *N. Y.*, 415), and *in re O'Neil* (91 *N. Y.*, 516) are not applicable to the case under consideration. In each of those cases, the testator failed to sign the will at the end as

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WALKER v. DOW.

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required by the statute. Mrs. Stevens signed the will, as a finished, completed instrument, at the end thereof.

Nor is there anything in the point that one of the subscribing witnesses wrote the name of the testatrix. She wrote it at the request of testatrix, and a request which was accompanied with a mention of her name in full. That is a sufficient subscription (*Robins v. Coryell*, 27 *Barb.*, 556; *Redf. Surr. Prac.* [3d ed.], 163, 164; 44 *Barb.*, 494).

A decree will be entered admitting said will to probate, exclusive of the inserted clause.

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CATTARAUGUS COUNTY.—HON. ALFRED SPRING,  
SURROGATE.—July, 1888.

## WALKER v. DOW.

*In the matter of the estate of HENRY C. WALKER, deceased.*

The administrator of intestate's estate, who was a private banker, paying no interest on deposits, and kept the funds of the estate, which was small in amount and difficult in settlement, in his own bank,—on filing his account, omitted to charge himself with interest. Objections having been interposed, and a brief hearing had, the court required the payment of interest, but, it appearing that the accounting party had acted in good faith, and that his remuneration was an inadequate reward for the services rendered,—

*Held*, not a proper case for charging him personally with the costs of the accounting.

DECEDENT died intestate March 14th, 1885, and

letters of administration were issued to his widow and one Amos Dow on April 4th, following. On November 26th, 1887, Dow, the acting administrator, filed his account and petitioned for a judicial settlement thereof. The widow and Frank Walker, decedent's son and next of kin, objected that the administrator had not charged himself with interest upon the estate funds, which had lain in his bank more than a year and a half.

M. V. BENSON, *for accounting party.*

CROWLEY & REILLY, *for objectors.*

THE SURROGATE.—The counsel for the next of kin urges, with some vehemence, that the administrator, Dow, should be personally charged with the costs in the proceeding.

Mr. Dow was the acting administrator, and the estate committed to him was intricate and perplexing. He filed his account in proceedings for judicial settlement, and objection was filed thereto, alleging that he did not account for interest on the funds held by him as administrator. Mr. Dow was cross-examined by the contestant's counsel, and testified that he was a private banker, and kept the funds of this small estate in his bank, and supposed that he was not chargeable with any interest, as he paid no interest on deposits. He was ordered to account for such interest as he had received, and now he is sought to be charged with the costs of the accounting. There was no attempt at concealment by the administrator, and he prepared his account in perfect good faith, and the

sum total of the trial consisted of this brief cross-examination.

I do not think it is a proper case to make the administrator pay the costs, personally. The cases cited by the counsel for contestant are either where a personal claim has been presented by the administrator, and, after a long trial, has been rejected and disallowed, or where he goes into a court of law in his representative capacity, but solely for his own benefit, and is personally chargeable with the costs.

I hardly think the case under consideration is one of those, or parallel to either. The imposition of costs against an administrator personally, on the judicial settlement of his account, is of rare occurrence and should not be made from any trivial cause. The compensation the administrator received for his services in the administration of this estate inadequately paid him for the annoyance and trouble he was caused, and justice does not require a still further diminution of this pittance by burdening him with costs.

The motion to make him pay the costs, personally, is denied.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—October, 1887.

LORILLARD v. PEOPLE.

*In the matter of the estate of CATHARINE L. WOLFE, deceased.*

No "collateral inheritance tax" is payable upon the passing of real property, situated without the State of New York, under a devise contained in the will of a resident.

ASSESSMENT of tax upon interests of legatee and devisee under decedent's will.

PLATT & BOWERS, for L. L. Lorillard.

THE SURROGATE.—The testatrix was, at the time of her death, a resident of the city of New York. Among the provisions of her will, are a devise to Louis L. Lorillard of certain real estate in the city of Newport, in the State of Rhode Island, and bequests to the same legatee of certain personal property, including a legacy of \$250,000 in money. A question has arisen, as to whether the passing of this property by virtue of the decedent's will is taxable under our so-called Collateral Inheritance law (chap. 483, Laws 1885). I find no reason for doubting that the aforesaid legacies of personalty are liable to the tax in question, and that the devise of realty is not.

The provisions of the statute under consideration are, in substance, the same as those of the Collateral



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MATTER OF DELAPLAINE.

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Inheritance law of Pennsylvania. Upon grounds which seem to me to be well-founded, the courts of that State have frequently upheld the contention made in behalf of this devisee (Hood's Estate, 21 *Penn. St.*, 106; Commonwealth v. Coleman, 52 *id.*, 468; Drayton's Appeal, 61 *id.*, 172; Miller v. Commonwealth, 111 *id.*, 321).

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—July, 1887.

## MATTER OF DELAPLAINE.

*In the matter of the probate of the will of JOHN F. DELAPLAINE, deceased.*

After the removal of a probate proceeding from the Surrogate's court of New York county to the Court of Common Pleas, pursuant to Code Civ. Pro., § 2547, as amended in 1886, it is doubtful whether the Surrogate can vacate the order of transfer in order to entertain an application for an order for the examination, before trial, of a witness about to leave the State, although the latter tribunal has no power to direct the examination under Code Civ. Pro., §§ 870, 872.

MOTION for order vacating order transferring special proceeding to Court of Common Pleas.

H. W. TAFT, and D. H. CHAMBERLAIN, for the motion.

L. B. CHASE, BILLINGS & CARDOZO, and J. A. WELCH, opposed.

THE SURROGATE.—In the exercise of the discretionary authority conferred upon him by § 2547 of the

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MATTER OF DELAPLAINE.

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Code of Civil Procedure, the Surrogate made an order on October 25th, 1886, transferring the above entitled proceeding to the Court of Common Pleas. On June 2d, 1887, the petitioners for probate of the paper claimed to be a codicil to this decedent's will obtained from that court an order for the examination before trial, of a witness who was about to leave the State. This order was subsequently vacated, on the ground that the Code provisions upon which it was founded have no application to special proceedings, but are confined to actions.

In view of the fact that the proponents, because of the peculiar circumstances surrounding this case, will be unable, as they claim, to present the testimony upon which they rely unless they can be allowed to take such testimony by commission, they now ask me to vacate and set aside the order of transfer aforesaid, and to reassume control of the controversy over probate. It is claimed by the respondents that the Surrogate's court has divested itself of authority in the premises by the order of transfer, and that the jurisdiction of the Court of Common Pleas has irrevocably attached.

It is true that, by the terms of the order, which is in strict conformity with the Statute on which it is based, the special proceeding for probate is itself transferred, but it is nevertheless insisted by the proponents that a careful reading of § 2547, as a whole, shows that it merely contemplates the trial, in the Court of Common Pleas, of controverted questions of fact by a jury—a proceeding in the special proceeding for probate,—and that in all respects, except as regards such a trial, the Surrogate's jurisdiction of the proceed-

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MATTER OF BAKER.

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ing itself, after a transfer, remains as complete as if such transfer had never been made.

If the situation existing when this application was presented were in all respects unchanged, the continuance of this proceeding in the Court of Common Pleas would seem to render it impossible for the proponents to secure evidence without which they cannot safely go to trial. But public notice has been given that, during the coming month, the Surrogate will be absent from the city, and that until his return the powers and jurisdiction of the Surrogate's court will be exercised by the Court of Common Pleas. Under these circumstances, as I have great doubts whether I have power to vacate the order of transfer, I decline to do so. The proponents may doubtless obtain from the Court of Common Pleas, in my absence, an order for the examination of witnesses whose attendance they will be unable to procure at the trial.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—August, 1887.

## MATTER OF BAKER.

*In the matter of the estate of LEWIS BAKER, deceased.*

The existence of a trust provision, in a testator's will, made to secure the dower right of one therein referred to as his wife, establishes the marital character, in the absence of opposing evidence, of one identified as the person intended, for the purpose of the protection of her rights in a Surrogate's court.

## MATTER OF BAKER.

The rule whereby a testamentary direction for the payment of interest or income of a fund, to one to whom the principal is directed to be paid or is given at a future time, is held indicative of an intent to vest the legacy, applies exclusively to cases in which the *entire* interest or income is so devoted.

Testator by his will, gave certain real property to a trustee, with directions to pay, out of the rents, an annuity and the dower right of his wife, and what remained, during the lifetime of the annuitant and wife, to his heirs at law, and, after the death of the life beneficiaries, to sell the property and pay the proceeds to his heirs at law. The trustee having died, the heir, before a successor was appointed, collected the rents, appropriated the same to his own use, omitted to pay the amounts due to the widow, and died. Upon the settlement of the account of the trustee's successor,—

*Held*, that the widow's claim, arising out of such appropriation was not against the trust estate, and, if disputed by the heir's representatives, was enforceable only in another tribunal.

JUDICIAL settlement of account of testamentary trustee. The facts appear sufficiently in the opinion.

M. J. O'BRIEN, *for trustee*.

B. SKAATS, *for widow*.

P. D. PENFIELD, *for Margaret Rogers*.

THE SURROGATE.—By one of the provisions of his last will and testament, this testator gave to his executors and trustees a certain lot of land and the house thereon, with directions to collect the rent arising therefrom and to dispose of the same as follows:

"*First*. To pay to my wife's sister, Maggie Rogers, the sum of \$500 annually, during her natural life. . . .  
*Second*. The remaining rents and profits (after they," *i. e.*, the executors and trustees, "shall have paid the dower right of my wife in said house). . . . to pay unto my heirs at law during the lifetime of my said wife and the said Maggie Rogers. . . . After the

## MATTER OF BAKER.

death of my said wife and the said Maggie Rogers, I order, authorize and direct my executors and trustees to sell my said house and lot . . . . . and after such sale to pay the net proceeds of the same unto my heirs at law."

The testator died in 1878. James Murphy, who was named in his will as one of the executors and trustees of his estate, qualified as such, and duly performed the duties of that office until his death, in August, 1880. Over three years elapsed before the trust estate was put in the hands of Murphy's successor, who is accounting in the present proceeding. During that period, William Baker, who was, at the testator's death his sole surviving next of kin and heir at law, had collected the rents of the trust property, and had appropriated the greater part thereof to his own use. He had satisfied, from time to time, the claim of the annuitant, but had failed to pay the taxes and other charges, and had almost entirely ignored the claim of the beneficiary described by the testator as his wife. The trustee here accounting entered upon the duties of his office in November, 1883. Between that date and June 1885, he paid to William Baker, on account of his interest as legatee under this testator's will, divers sums of money, amounting in all to \$961. William Baker died in September, 1885, and, for discharging his funeral expenses, the trustee paid to his widow the sum of \$100. A referee, to whom the trustee's account and the objections thereto were lately submitted, has held that the trustee must be disallowed credit for these advances, for the reason that, at the time they were

## MATTER OF BAKER.

made, there were other obligations of the estate that were entitled in priority to be discharged.

Several questions not submitted to the determination of the referee are now presented for decision:

1. The first of these questions concerns the status of the contestant Mrs. Conklin—her claim to be the testator's widow, and to be entitled as such to dower in the real property that is the subject of the trust to which this controversy relates. Mrs. Conklin is a sister of the Maggie Rogers mentioned in the will, and is admittedly the person referred to by the testator as his wife. The trust provision, as heretofore quoted, contains a distinct recognition of her dower right; this recognition raises of itself a presumption of her widowhood, and is, in the absence of opposing evidence, sufficient to establish it for the purposes of this proceeding. Besides, it has been still further established by the Supreme Court judgment, to which reference is made in the papers before me.

2 William Baker having wrongfully collected and applied to his own use certain income of this estate that was justly applicable to the satisfaction of the dower interest of the widow, the question arises whether, in the present proceeding, her loss can be to any extent repaired. It does not clearly appear whether the amount of the income received by this accounting trustee, down to the date of the death of William Baker, was or was not in excess of the claims of the testator's widow and his widow's sister for that period, plus the amount of the charges to which the estate was subject. In the event, however, that such shall be found to be the case, can the surplus be

## MATTER OF BAKER.

appropriated to supply the loss which the testator's widow has sustained by William Baker's misconduct? I am disposed to think that this court lacks the authority to direct such an appropriation, unless it is consented to by William Baker's representatives. The widow's claim, for such share as she was entitled to receive in the income of this trust for the years when William Baker collected and appropriated the rents, is not a claim against the trust estate. It is, rather, a claim against the estate of William Baker, and, if it is disputed, the claimant must resort to some other tribunal for its enforcement. Pending the commencement of proceedings to that end, the trustee may properly be directed to retain in his hands any sums that would now, but for William Baker's misconduct, be payable to his representatives.

3. Should the income that has accrued since William Baker's death be treated as a part of his estate, and be disposed of accordingly, in the manner indicated with respect to the surplus above considered, or are William Baker's children entitled thereto under the will?

The testator, after providing for his wife and her sister, gives the residue of the income of the trust estate to his "heirs at law" during the lives of the widow and sister and directs the house and lot to be sold after their death and the proceeds to be paid to his "heirs at law." Because of this direction to convert the property at the expiration of the trust and to distribute the proceeds, the *corpus* of the estate must be treated, for the purposes of the present inquiry, as personal property (*Teed v. Morton*, 60 *N. Y.*,

## MATTER OF BAKER.

502, 506; Vincent v. Newhouse, 83 *N. Y.*, 505, 511; Shipman v. Rollins, 98 *N. Y.*, 311, 326). It is only those persons who answer the description of heirs at law of the decedent at the time appointed for the conversion, who are entitled to share in the distribution; until then the parties entitled cannot be ascertained. The legacy is in its character contingent (Jones v. Sunday School, 4 *Dem.*, 272; Warner v. Durant, 76 *N. Y.*, 133, 136; Smith v. Edwards, 88 *N. Y.*, 92, 105; Delaney v. McCormack, *id.*, 174; Vincent v. Newhouse, *supra*; Shipman v. Rollins, *supra*; Delafield v. Shipman, 103 *N. Y.*, 463).

It is true, that the testator directs payment of a portion of the rents to the person who was his heir at law at his death; but, to work out the application of the rule that a testamentary direction for the payment of the interest or income of a fund to one to whom the fund is directed to be paid or is given at a future time is indicative of the intent of the testator to vest the legacy, the interest or income so given should be the *entire* interest or income produced by the fund and not a part thereof as in the case at bar (Warner v. Durant, *supra*; Smith v. Edwards, *supra*; Delafield v. Shipman, *supra*).

I hold that William Baker did not acquire, at this decedent's death, a vested remainder in the *corpus* of the trust estate. This conclusion seems to be in harmony with the actual intention of the testator, as disclosed by his will. The circumstance, that he refrained from designating his brother William as the person to enjoy the surplus income during the lives of the other two beneficiaries, and the proceeds of the disposition



## MATTER OF BAKER.

of the trust property thereafter, is one of much significance. To my mind, it is indicative of his purpose that the principal of the trust should be ultimately enjoyed by such person or persons as should answer to the description of his heir at law or heirs at law at the time designated for the final division and distribution of the estate, and of his further purpose that the income meanwhile should go to such persons as, from time to time, during the existence of the trust should be his heirs at law. It follows, therefore, that, since the decease of William Baker, the infants appearing herein have been entitled to the net income of the trust, in excess of the amount necessary for satisfying the provisions for the benefit of the testator's widow and her sister.

There must be an inquiry as to the extent of the rents received and appropriated by William Baker, in case it shall be ascertained that the trustee holds any balance in his favor or in favor of the estate. In the absence of better evidence, the amount of his monthly collections may be approximately arrived at by taking the average monthly rents received by the deceased trustee and by the trustee now accounting. I have ascertained such average to be \$200.

The action of the trustee, with reference to the arrears of annuity and income owing to the testator's widow and her sister, not being of a nature to justify his being charged personally with interest upon such arrears, the parties entitled to such arrears are, as against the trust fund, entitled to recover only such interest thereon as the moneys applicable to their payment have actually yielded (*Martyn v. Blake*, 3

## MATTER OF BUNCE.

*Dr. & War.*, 125; *Taylor v. Taylor*, 8 *Hare*, 120, 126; *Torre v. Browne*, 5 *H. L. C.*, 555; *Booth v. Coulton*, 2 *Giff.*, 514; *Lainson v. Lainson*, 18 *Beav.*, 7; *Booth v. Leycester*, 3 *Myl. & Cr.*, 459; *Isenhardt v. Brown*, 2 *Edw. Ch.*, 340, 347; *Blauvelt v. De Noyelles*, 25 *Hun*, 590).

Of course, any balance that may be found in favor of William Baker can be made available for the satisfaction of interest on the arrears of the widow's income in precisely the same manner as I have above indicated with respect to the satisfaction of such arrears themselves. Before the application of such income for either of these purposes, however, any arrears of taxes or any like charges, incurred during the lifetime of William Baker, must be discharged.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—September, 1887.

## MATTER OF BUNCE.

*In the matter of the estate of CAROLINE A. BUNCE, deceased.*

As to whether, under L. 1855, ch. 547, the illegitimate child of a mother, who has died leaving a will executed before the birth of the former, has the same rights, in respect of such parent's property, as are accorded to lawful issue by 2 R. S., 64, § 43, and 2 R. S., 65, § 49,—*quære*. The will of a testatrix so dying, is entitled to probate, although it contains no mention of, or provision for such child, and notwithstanding that the maker has failed to provide for the latter by settlement or otherwise.

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MATTER OF BUNCE.

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PETITION for probate of decedent's will; opposed by infant child of decedent.

W. R. SPOONER, *for proponent.*

JOHN D. AHRENS, *special guardian for contestant.*

THE SURROGATE.—This decedent died, an unmarried woman, in February, 1886. In December, 1885, she had executed a written instrument, which has lately been propounded for probate as her last will and testament. Shortly before her death, and after the execution of this paper, she gave birth to a daughter. This daughter would be entitled under our statutes, in the event of decedent's intestacy, to succeed to her entire estate, and has, therefore, a right to appear in the present proceeding and to oppose probate of the paper propounded as her mother's will. Such opposition is made in her behalf; it is claimed that, as the disputed paper makes no provision for the child and no mention of her, and as the decedent failed to provide for her by settlement or otherwise, the alleged will must be rejected and set at naught as of course, even though it may have been duly executed by a free and competent testatrix.

This claim is not well founded. Assuming for present purposes that, by force of chap. 547 of the Laws of 1855, this contestant has precisely the same rights that would be hers were she the offspring of her mother's lawful marriage—(and upon this point I do not now intimate any opinion)—it is nevertheless true that, if the alleged will of 1885 was duly executed, the circumstances which the special guardian of the infant has set up in his objections have not

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sufficed to work its complete revocation. Despite those circumstances, the instrument, in the absence of other objections, must go to probate, even though none of its provisions except its appointment of an executor may be practically effective (*Matter of Gall*, 5 *Dem.*, 374).

No proofs of its execution have yet been taken. It is manifest, therefore, that no determination respecting its validity, construction and effect can now be had. When such proofs shall have been submitted, the claims of the illegitimate child of the decedent may be again called to my attention.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—September, 1887.

## STACK v. STACK.

*In the matter of the application for probate of a paper propounded as the will of DANIEL J. STACK, deceased.*

In a special proceeding instituted to procure the admission to probate of the will of decedent, the right of his father to oppose was assailed by proponent, his widow, on the ground of want of interest, she contending that her infant daughter, H., was a lawful child of decedent, and as such entitled, in case intestacy should be established, to the entire estate, exclusive of proponent's share.

There was evidence that, in 1878, decedent had been married to A., from whom he separated after a cohabitation of several years, without issue; in 1882, decedent became a resident of Connecticut and cohabited with proponent, who, in 1884, in that State, gave birth to H.,—whom dece-

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dent recognized as his daughter; in the same year, A. procured a divorce from decedent, in New York, the judgment containing the usual prohibition to marry; soon thereafter decedent and proponent were duly married, though not domiciled, in Pennsylvania, whereupon they returned to and resided in Connecticut, until decedent's death, in 1885.—*Held*,

1. That the marriage in Pennsylvania, being valid there, must be recognized as valid in this State.
2. That, the statutes of Pennsylvania and of Connecticut legitimizing a child, so born and recognized, of parents afterwards intermarrying,—H. was decedent's sole heir and next of kin, and contestant without standing in court, unless he could disprove the infant's alleged paternity.

Miller v. Miller, 91 N. Y., 315—compared.

APPLICATION for probate of decedent's will. The facts are stated in the opinion.

FRASER & MINOR, *for petitioner*.

WILLIAM P. BURR, *for contestant*.

THE SURROGATE.—The probate of the paper propounded in this court as the last will and testament of Daniel J. Stack, deceased, is opposed on various grounds by Thomas Stack, his father.

The right of Thomas Stack to make this opposition is assailed by Ella M. Stack, who is the proponent of the disputed paper, and is named therein as its executrix, and as universal devisee and legatee of decedent's estate. She claims to be the widow of decedent and the mother of one Helena Stack, an infant, of whom decedent was the father, which infant, as the proponent claims, became entitled at its father's death, in the event that its father should be discovered to have died intestate, to take, as his only next of kin and heir at law, his entire estate, except such share therein as could be justly claimed by the proponent as his widow.

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The contest over the issues, raised by the petition for probate and the objections thereto, has been postponed to await the result of an inquiry whether Helena Stack is the lawful "child" of the decedent, within the meaning of that word as used in our statutes of descent and of distribution.

Evidence has been introduced, tending to establish the following facts: That, in the year 1878, the decedent was lawfully married to one Eva L. Eichwitz; that thereafter the two lived together as husband and wife for several years; that they then separated; that no children were born of their marriage; that, in the year 1882, the decedent, being still the husband of the said Eva, became a resident of the State of Connecticut, and in that State cohabited with the proponent; that in March, 1883, at a place called Sound Beach, in the State of Connecticut, the proponent gave birth to a child, whereof decedent was the father; that such child survived decedent, and is the same person referred to in the petition for probate herein as Helena Stack; that, in April, 1883, the said Eva L. Stack commenced, in the Superior Court of the city of New York, proceedings for an absolute divorce from the decedent on account of his adultery with the proponent; that, in November, 1883, such divorce was for that cause decreed by said court; that, by said decree the decedent was prohibited from re-marrying in the lifetime of said Eva L. Stack; that in December, 1883, while said Eva was yet living, the decedent and the proponent, being together in the city of Philadelphia, in the State of Pennsylvania, were married by a magistrate of said city, in accordance with the mar-

riage laws of said State; that the decedent and the proponent straightway returned to the State of Connecticut, and there continued to reside until the decedent's death in April, 1885.

The would-be contestant will hereafter be afforded opportunity, if he desires it, to present evidence tending to show that the decedent was not, in fact, the father of Helena Stack; but it will be assumed, for present purposes, that the evidence tending to establish his paternity will not be overthrown. Upon the facts above stated two questions arise:

1. Should the Pennsylvania marriage be upheld, for the purposes of this proceeding, as lawful and valid in the State of New York?

2. Did such marriage legitimate the said Helena Stack, so as to make her, upon decedent's death, his next of kin and heir at law, not only in Pennsylvania but also in the States of Connecticut and New York?

It has been the settled law of New York ever since the decision of the Court of Appeals in *Van Voorhis v. Brintnall* (86 *N. Y.*, 18), that, despite the provision in a decree of divorce granted by a court of this State, on the ground of the adultery of one of the parties, prohibiting such party from marrying during the lifetime of the other, a marriage entered into by such party in another State, if valid there is valid here, even though the parties to such marriage be residents of this State, and even though they have gone to such other State for the very purpose of evading the laws of New York (*Thorp v. Thorp*, 90 *N. Y.*, 602; *Moore v. Hegeman*, 92 *N. Y.*, 521). No proof has been submitted, in the present case, as to the existence of

any restrictive provisions in the law of Pennsylvania, because of which decedent's marriage with the proponent was not valid in that State; but counsel for contestant quotes in his brief a section of a Pennsylvania statute which declares that "the husband or wife who shall have been guilty of the crime of adultery shall not marry the person with whom the said crime was committed during the life of the former wife or husband." This provision forms a part of a statute which relates entirely to divorces decreed by the courts of Pennsylvania in accordance with the laws of that State. It affects only such persons as have been parties to divorce proceedings in the tribunals of that State and has no application to persons whose adulterous relations have formed the basis for decrees of divorce outside the limits of Pennsylvania (*Van Voorhis v. Brintnall*, *supra*; *Dorsey v. Dorsey*, 7 *Watts*, 349; *Bullock v. Bullock*, 122 *Mass.*, 3; *Hill v. Hill*, 42 *Penn. St.*, 198, 204).

I hold, therefore, that the marriage of the decedent and proponent was valid in Pennsylvania, and as it was not contrary to the laws of nature, and is not shown to have been rendered void by any positive law of New York or of Connecticut, it must be treated as valid in New York and as valid in Connecticut.

The testimony shows that there is a statute of Pennsylvania, whereby a child born out of lawful wedlock is made legitimate by the marriage of its parents. This statute is as follows: "In any and every case where the father and mother of an illegitimate child or children shall enter into the bonds of lawful wedlock and cohabit, such child or children



shall thereby become legitimate and enjoy all the rights and privileges as if born during the wedlock of their parents." A similar provision is shown to have been ever since June, 1876, upon the statute book of Connecticut. It declares that: "Where the parents of children born before marriage afterwards intermarry and recognize such children as their own, such children shall inherit equally with their other children under the statute of distributions, and shall be legitimate."

It was held by the Court of Appeals, in *Miller v. Miller* (91 *N. Y.*, 315), that when an illegitimate child has by the subsequent marriage of its parents become legitimate, by virtue of the laws of the State or country where such marriage has taken place and where its parents have been domiciled, it is thereafter legitimate everywhere. *Miller v. Miller* would be decisive of the case at bar if, at the time the decedent and the proponent intermarried, they had been domiciled in the State of Pennsylvania. They were in fact domiciled at that time in the State of Connecticut, but in that State the legitimation of a child born out of wedlock could be effected, precisely as in Pennsylvania, by the subsequent marriage of its parents, provided only that the parents thereafter recognized the child as legitimate. Such recognition has been established in the case at bar. I hold, therefore, that the infant Helena Stack from the time of the intermarriage of her parents, became their legitimate child in the State of Connecticut, and that her claim to be decedent's next of kin and heir at law must here be upheld.

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MATTER OF COLLINS.

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As the case now stands, therefore, decedent's father seems to have no interest in the estate; he will however, as has been already stated, be permitted to show, if he can, that the decedent and Helena Stack were not father and daughter.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—September, 1887.

## MATTER OF COLLINS.

*In the matter of the estate of MICHAEL COLLINS, deceased.*

One applying for a new trial, on the ground of newly discovered evidence, must present the affidavits of the proposed witnesses, or explain his omission.

MOTION for new trial.

W. C. BEECHER, *for the motion.*

J. O'BYRNE, *opposed.*

THE SURROGATE.—I must deny the motion for a new hearing herein. I am not entirely satisfied that, by the exercise of reasonable diligence, the respondent's attorney might not, before trial, have discovered the evidence upon which he now relies. And, besides, he does not present the affidavits of the persons from whom he expects the additional testimony or show why he has failed so to do. This circumstance is of itself fatal to his application (*Shumway v. Fowler*, 4

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MATTER OF MOREY.

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*Johns.*, 425; *Denn v. Morrell*, 1 *Hall*, 382; *Sheppard v. Sheppard*, 5 *Hals.*, 250; *Smith v. Cushing*, 18 *Wisc.*, 295; *Gould v. Moore*, 40 *N. Y. Sup'r.*, 387; *Arnold v. Skaggs*, 35 *Cal.*, 684; *Cowan v. Smith*, 35 *Ill.*, 416; *Bright v. Wilson*, 7 *B. Mon.*, 122).

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—September, 1887.

MATTER OF MOREY.

*In the matter of the estate of HARRIET MOREY, deceased.*

Under Code Civ. Pro., §§ 1312, 1351, the mere pendency of an appeal, taken by an executor from a judgment rendered against him in his representative capacity, is no bar to a motion, made by the creditor under *Id.*, § 1825, for leave to issue execution.

APPLICATION for leave to issue execution against executor.

H. M. WHITEHEAD, *for petitioner.*

J. P. REED, *for executor, opposed.*

THE SURROGATE.—On March 21st, 1887, the petitioner herein recovered, in the Supreme Court, a judgment against the executor of this estate, in the sum of \$1,349.22. The petitioner now asks leave, under § 1825 of the Code of Civil Procedure, to issue an execution for the enforcement of such judgment,

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MATTER OF MOREY.

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alleging in his application that the respondent has in his hands funds of the estate applicable to such judgment in excess of all sums chargeable against him for expenses, and in excess of all claims of greater dignity than the petitioner's and of all claims of the class to which that of the petitioner belongs. The respondent does not deny this allegation as to sufficiency of assets, but insists that leave to issue execution should be refused because he has appealed from the judgment aforesaid to the General Term of the Supreme Court. He admits that he has given no undertaking on such appeal, to effect a stay of proceedings, and that he has obtained no stay from the Supreme Court.

Section 1351 of the Code of Civil Procedure declares that, only where it is specially prescribed by law (and there is no special prescription in cases like the case at bar), does an appeal to the General Term operate, of itself, as a stay of the execution of the judgment appealed from, but such stay must be effected, if at all, by filing a proper undertaking or by procuring a direction of the court into or from which the appeal is taken, or of a judge thereof. Section 1312 provides that, where an appeal has been taken by an executor to the General Term, the court into or from which the appeal is taken may, in its discretion, and upon notice to the respondent, dispense with or limit the security.

I hold, therefore, that the mere fact of the pendency of this respondent's appeal will not justify me in denying the petitioner's application. A contrary view is taken in *Curtis v. Stilwell* (32 *Barb.*, 354), cited by

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FLAGG V. HARBECK.

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the executor's counsel, but that decision was reversed by the Court of Appeals (25 *How. Pr.*, 595).

Unless the respondent shall within ten days obtain a stay of proceedings, the petitioner may issue execution.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—October, 1887.

FLAGG v. HARBECK.

*In the matter of the estate of ELLA S. FLAGG, deceased.*

Decedent, by her will, made certain dispositions in favor of her husband, as follows: (1) she bequeathed to him certain jewelry and apparel; (2) gave him "\$1,700, absolutely," stating that this sum represented a gift from him, and that she did not consider it a part of her estate; (3) gave him "\$2,000, absolutely"; (4) gave \$8,000 to the executors, in trust to invest, etc., and pay the "interest and income," to him, for life,—remainder over; and (5) directed that, if he were living when her son, H., attained majority, the executors take \$10,000 out of the principal of the share of H., invest the same, etc., and pay the "interest and income" to the husband, for life,—remainder over.

A codicil read as follows: "I hereby revoke any bequest of money or interest of money made in my last will and testament to my husband, excepting the interest at 6 per cent. of \$10,000 during his lifetime, and the sum of \$2,000 which, as I have stated in my will, I consider a gift from him," etc. It was contended that the "exception" in the codicil, operated as a revocation, *in toto*, and effected a new and substantive bequest.—

*Held*, that the codicil, though not precise in its descriptions, must be held to revoke all the pecuniary bequests to the husband, except the third, and the last, in the foregoing enumeration.

CONSTRUCTION of will, upon judicial settlement of  
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account of Charles T. Harbeck and another as executor of decedent's will.

RICHARD & BROWN, *for executor.*

F. P. SLADE, *for legatees.*

**THE SURROGATE.**—The disposition of this decedent's estate is directed by two testamentary papers—a will proper and a codicil thereto. The earlier of these instruments contains, among other things, the provisions following :

*First.* A bequest, to the husband of the testatrix, of certain jewelry and wearing apparel.

*Second.* A bequest thus worded: "I give to my said husband the sum of \$1,700 absolutely. This sum he gave to me, and I do not consider it a part of my estate. I also give to my said husband the sum of \$2,000 absolutely.

*Third.* A bequest, in its fourth article, of the sum of \$8,000 to "its executors," in trust for the following use and purpose: "That they shall loan out or invest the same and collect and receive the interest and income thereof, and shall, from time to time, as said interest and income shall be received, pay all of said *interest and income* to my said husband, James S. Flagg, so long as he shall live. Upon his death, I give said principal sum of \$8,000 to my child or children, and lawful issue of deceased child or children of mine living at the decease of my said husband . . . ."

The will further directs, by its sixth article, that, in the event that the husband of the testatrix shall be living at the time when her son Herbert shall attain his majority, her executors shall take the sum of

\$10,000 from out the share of the principal of her estate then held in trust by them for her child's benefit, and shall invest the same, and collect and receive the interest and income thereof, and pay all of said interest and income semi-annually to her husband as long as he shall live. The principal sum of \$10,000 is given, upon the death of the husband, to the child or children and the lawful issue of any deceased child or children of the testatrix who shall be then living.

The codicil to this will contains a provision which is the subject of the present controversy. It is as follows: "I hereby revoke any bequest *of money or interest of money* made in my last will and testament to my husband James H. Flagg, *excepting* the interest at 6 per cent. of \$10,000 during his lifetime, and the sum of \$2,000 which, as I have stated in my will I consider a gift from him, and therefore do not include in my estate."

I am satisfied that it was the intention of the testatrix, in using the words following the word "excepting," to take out of the operation of the revocation provision, and to sanction anew as effective dispositions, two of the gifts which she understood to have been bequeathed by her will. Neither of these gifts is described in the codicil with absolute precision, but I cannot doubt that, in using the words "interest at 6 per cent. of \$10,000 during his lifetime," she intended to refer to the bequest of "the interest and income of \$10,000" which the will gives her husband in case he shall be living when her son Herbert shall come of age. The codicil does not undertake to revoke *all* the provisions of the will for Mr. Flagg's benefit. It

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MATTER OF M'CREADY.

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revokes all *except* the one above indicated and the one which bequeaths the legacy of \$2,000. The contention, that the language in dispute was intended to operate as a revocation *in toto*, and that the words following the word "excepting" are effective as a new and substantial bequest, seems to me utterly untenable.

Although the guardian of the infant gave security upon his appointment and qualification in Kings county, he must execute and deposit a bond, in pursuance of § 2746 of the Code of Civil Procedure, before he can obtain possession of his ward's estate (*Rieck v. Fish*, 1 *Dem.*, 75).

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—October, 1887.

## MATTER OF MCCREADY.

*In the matter of the estate of MARGARET MCCREADY, deceased.*

The final clause of the first section of the "Act to tax gifts, legacies and collateral inheritances in certain cases,"—L. 1885, ch. 483, as amended by L. 1887, ch. 713,—whereby it is "provided that *an estate* which may be valued at a less sum than five hundred dollars shall not be subject to such duty or tax," operates to relieve from the excise a testamentary beneficiary, or a distributee in intestacy, who takes an interest of a value less than \$500; and does not refer to the *estate* of the testator or ancestor.

ASSESSMENT of "collateral inheritance tax" upon



## MATTER OF M'CREADY.

the passing of interest under decedent's will. The facts are stated in the opinion.

J. G. STEARNS, *for executor.*

THE SURROGATE.—It is, among other things, provided by section 1 of chapter 483 of the Laws of 1885 that “all property which shall pass by will from any person who may die seized or possessed of the same while being a resident of this State to any person or persons other than to certain classes of persons in such section specified, shall be subject to a tax of five dollars on every hundred dollars of the clear market value of such property.” It is, by the same section; further provided that “an estate which may be valued at a less sum than five hundred dollars shall not be subject to said tax.”

This testatrix, who was at the time of her death a resident of the county of New York, and who died seized and possessed of property of the value of several thousand dollars, bequeathed, by her will, three legacies, of \$400 each, to persons not included within any of the classes exempted from taxation. Are those legacies liable to the tax? in other words, does the \$500 proviso above quoted relate to the *entire* “estate” of a testator, or does it relate rather to the *particular* “estate” which is conferred by such testator's bounty upon his legatee or devisee?

Of these two interpretations, the former seems most consistent with certain portions of the statute in question, and the latter with certain other portions, but taking the act as a whole I am of the opinion that,

whatever may be the extent of a testator's possessions, such of his bequests and devises as are of less value than \$500 are not subject to tax.

The title of the statute here under consideration is "An act to tax gifts, legacies and collateral inheritances," and this title is well chosen to indicate in general terms the purpose declared by the legislature in the body of the statute. The tax is not imposed upon a testator's entire "estate" as such; it is imposed, under certain circumstances, upon each and every passing or devolution of property ordered by his will in favor of each and every beneficiary not within the excepted classes. The burden of this tax rests upon such beneficiary, and not upon the general estate of his testator; apart, therefore, from any critical examination of the somewhat obscure phraseology of the statute, it would seem probable that the legislature intended that the exemption should apply, not to such general estate, but to the legacies and devises which, save for such exemption, would be subject to tax. There is, surely, little reasonableness in a scheme that would relieve from taxation the taker of a \$400 bequest, parcel of a \$450 estate, but would deny such relief to the taker of a like bequest, parcel of an estate of more considerable value.

The contention that the proviso relates to the several parcels of property passing to a testator's beneficiaries, rather than to the entire property of the testator himself, finds support in the circumstance that the estate exempted is not an estate *which is of less value* than \$500, but "an estate which may be *valued* at a less sum than \$500." Valued by whom?

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MATTER OF M'CREADY.

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The answer to this question is found I think in § 13, which directs the appointment of appraisers "to fix the value of property of persons whose *estates* shall be subject to the payment of such tax;" and, as has been stated already, the estates of decedents are not, as an entirety, subject to tax at all. The valuation referred to in § 1 is thus discovered to be the valuation of appraisers, which appraisers are not called upon under the act to value any portion of a decedent's estate except portions passing to persons of the taxable class.

It may be added that, if the proviso to § 1 was intended to effect any other purpose than the relief from taxation of the recipients of small bequests, devises and distributive shares, it must have been intended to relieve persons upon whom the law casts the labor of assessing and collecting the tax, from performing that labor in cases where only a petty revenue would result to the State. But how far is that object effected by the proviso here in question, assuming that its word "estate" means the estate of the decedent? If a testator leaving property of the value of \$500, or upwards, gives all of it except a single dollar's worth to persons exempt from the tax, and gives that dollar's worth to a person not exempt, the machinery of the statute must be set in operation to collect the five cents to which the State is in such a case entitled. Herein lies an argument against any interpretation of the proviso except an interpretation that would involve the freedom from taxation of the three legacies of \$400 each in the case at bar.

I hold that those legacies are not taxable.

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FARQUHARSON V. NUGENT.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—October, 1887.

FARQUHARSON v. NUGENT.

*In the matter of the estate of MEMICAN H. HOWARD, deceased.*

An executor who has paid a "collateral inheritance tax," upon a legacy to an infant, with the knowledge and consent of his general guardian, cannot, on a subsequent accounting, be held liable, at the instance of a guardian *ad litem*, for the amount so paid, upon the ground of an alleged exemption.

No commissions accrue upon a specific legacy, although the article bequeathed has been sold, and the price collected and paid over by the executor, with the approval and by the direction of the legatee.

UPON the judicial settlement of the account of Frederick F. Nugent, ancillary executor of decedent's will, Anne Farquharson and another, infant specific legatees, objected to the charge of \$3,046.32, being amount of "collateral inheritance" tax, with interest, assessed and paid by the executor to the city comptroller, on June 9th, 1887, so far as the same was a charge upon two fifths of the specific legacy bequeathed to Mrs. Lydia D. Farquharson and her four children, on the ground that the legacy was not taxable because testator, at the time of his death, was not a resident of, nor domiciled within the State of New York, but was then a resident of, and domiciled within the State of Pennsylvania, where his will was probated, and letters testamentary therein issued; "wherefore said tax was erroneously paid by said ancillary

executor, and is not a charge upon these infants' share thereof, and the same should be recovered by said ancillary executor as provided by § 12 of said act."

WYLLYS BENEDICT, *for ancillary executor.*

A. R. GENET, *special guardian.*

THE SURROGATE.—I do not feel called upon to decide in this case whether the legacy to Mrs. Farquharson and her four children was or was not subject to taxation under the so-called Collateral Inheritance Law, at the time when the accounting party paid the tax thereon.

It is alleged in his behalf, and is not denied, that the appraisement of this legacy was made in compliance with the formalities provided by the statute and after due notice to the legatees. The tax was assessed and fixed by the Surrogate on June 9th, 1887, and was on that day paid by the executor. Six days theretofore, he had procured from all persons interested in the legacy, including Mrs. Farquharson, as guardian of these infant objectors, a consent that the tax be paid. Under these circumstances, the special guardian's claim, that the executor should be charged with two fifths of the total payment, must be overruled.

The legacy here in question was a specific legacy, and, although the bond bequeathed was sold and converted into money by the accounting party, with the approval and by the direction of the legatees, I must disallow his claim to commissions.

MATTER OF JACOBSON.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—October, 1887.

MATTER OF JACOBSON.

*In the matter of the application for probate of a paper propounded as the will of DOROTHEA JACOBSON, deceased.*

Where a substantial portion of a will, as, e. g., the clause appointing an executor, appears beneath the subscription of the testator, the question whether the will is invalid, or such clause surplusage, depends upon when the latter was inserted.

APPLICATION for probate of decedent's will.

ALBERT BACH, *for proponent.*

LOUIS LEVY, and S. J. CROOKS, *for contestants.*

THE SURROGATE.—I am satisfied, by the testimony submitted in this proceeding, that the paper propounded for probate as the will of Dorothea Jacobson was signed by her in the presence of the subscribing witnesses; that those witnesses severally appended their names to such paper at her request, and that, in their presence, she declared it to be her will. It is, however, contended that probate should be denied because the signature of the testatrix is not at "the end" of the instrument, as required by law.

Upon examination of the alleged will, it appears that the signatures of the witnesses are below the signature of the decedent, and that, underneath them

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all, appear the words: "William Wolff to be executor. Witness Dr. Harris, Mrs. Abrahamson and Mr. Goldberg." When this was written, or by whom it was written, the testimony does not clearly disclose. There is no appointment of an executor in the body of the instrument, and if in fact the words above quoted were inserted before execution, they must be considered as a part of a pretended testamentary paper, which is invalid for the reason insisted upon by the contestant's counsel. If, on the other hand, the words in question were not upon the paper at the time it was signed and published, its validity has not been destroyed by their subsequent insertion.

Further evidence may be offered in this regard, before the final determination of this controversy.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—October, 1887.

## PECK v. BELDEN.

*In the matter of the application for probate of a paper propounded as the will of SARAH H. PECK, deceased.*

Where an alleged will has been prepared, or its execution procured, by one interested in its dispositions, the ordinary burden of proof resting upon a proponent is increased by reason of the suspicion, which the law indulges, that the instrument may express the wishes of the beneficiary, rather than those of the decedent.

The paper purporting to be the will of decedent, an unmarried woman who left a number of blood-relatives, her surviving, was propounded by one who for many years had been her physician, was directly instrumental in procuring its execution, and was constituted sole beneficiary and executor. It appeared that decedent was, in the judgment of one of the subscribing witnesses, a physician, near the border line of insanity at the time of subscription; that she had repeatedly demurred to executing the instrument when requested to do so by proponent; and that the chirography resembled that of proponent, who, however did not admit that it was his own:—while, on the other hand, the evidence failed to show who originated the alleged will, in whose custody it had remained, how proponent obtained possession, or whether decedent had ever given any instructions as to its contents.—

*Held*, that the paper was undeserving of probate.

APPLICATION for probate of decedent's will. The facts are stated in the opinion.

BIRDSEYE, CLOYD & BAYLISS, *for proponent*.

N. B. SANBORN, and S. J. CROOKS, *for contestants*.

THE SURROGATE.—This decedent, who was a resident of the city of New York, died on the 31st of October last, leaving as her surviving next of kin and heirs at law a sister of the whole blood, a brother and a sister of the half blood, three nephews and two nieces.

On the day following her death, Dr. Ebenezer B. Belden propounded for probate in this court a paper purporting to be her last will and testament. No one of decedent's relatives, near or remote, is named in this instrument as a beneficiary; if it is in truth her will, her entire estate, which is admittedly of very considerable value, is now the property of the proponent, and its administration must be committed to his hands as sole executor. All the heirs at law and next of kin of the decedent have appeared in opposition to the propo-



ment's claims, and insist that, upon his own showing,—for he has rested his case—his petition for probate should be denied.

It is not disputed that, for many years prior to the execution of this paper, the proponent and decedent sustained to each other the confidential relation of physician and patient; nor is it disputed that the proponent was directly instrumental in procuring the paper to be executed. Its two subscribing witnesses are George Holl and Dr. John E. Stillwell. The latter acted as witness upon the express request of the proponent, and, upon a like request, invoked the services of his associate, Mr. Holl. Dr. Stillwell was at the time (June, 1882) employed as an assistant in Dr. Belden's office, and the two subsequently became partners. As to the origin of this alleged will, the evidence is utterly silent. There has been no proof of instructions and no production of a draft; the proponent has not undertaken to show by whose hand the paper was written, or to controvert the evidence strongly tending to show that the handwriting is his own. Dr. Stillwell's testimony in this regard is as follows: He said at first that the handwriting of the alleged will bore a resemblance to Dr. Belden's, and might be his, though he believed the contrary. He subsequently testified, after further scrutiny, "I believe it is in the handwriting of Dr. Belden." Upon the production of a paper written by the proponent in court and containing his signature, and a copy of a portion of the instrument in controversy, Dr. Stillwell said, in answer to a question whether he adhered to the belief that that instrument was in Dr. Belden's

hand, "There are remarkable points of resemblance, but I cannot determine."

If I were required to pass upon the question now under consideration, by my own unaided comparison between the will and the piece of writing which is admittedly the proponent's own, I should be greatly perplexed; but I see no such marks of dissimilarity between the chirography of the one paper and that of the other as to dispel the conviction, forced upon me by Dr. Stillwell's testimony and the proponent's silence, that the two pieces of writing are the work of the same hand. Now the proponent stands before the court, not as admitting that this alleged will was written by himself. Oh the contrary, out of the mouth of his counsel, he claims that the evidence will not warrant that conclusion. This is to my mind a circumstance of the gravest importance, in view of a legal doctrine which counsel for the contestants invokes in behalf of their clients.

That doctrine may be thus stated: Where a will has been prepared or procured by one interested in its provisions, an additional burden is imposed upon those who seek to establish it; the circumstance is regarded by the court with suspicion and jealousy, and there must be stronger proof than would else be required that the paper propounded expresses the free unbiassed testamentary purpose of the alleged testator, and not merely the wishes of the interested beneficiary. Moreover, the existence of a confidential relation, such for example as subsists between physician and patient, implies of itself peculiar opportunities for the exercise by the former over the latter of influence and author-

## PECK V. BELDEN.

ity, so that if he has been instrumental in procuring from his patient a will containing provisions greatly to his advantage, "fraud and undue influence will readily be inferred unless all jealous suspicion is put to rest" by satisfactory testimony (Schouler on Wills, 256; Newhouse v. Godwin, 17 *Barb.*, 236; Barry v. Butlin, 1 *Curt.*, 637; Baker v. Batt, 1 *Curt.*, 135; Wilson v. Moran, 3 *Bradf.*, 172; Ingram v. Wyatt, 1 *Hag. Ecc.*, 384; Crispell v. Dubois, 4 *Barb.*, 393; Kinne v. Johnson, 60 *Barb.*, 69; Post v. Mason, 91 *N. Y.*, 539; Trumbull v. Gibbons, 23 *N. J. Law*, 117; Boyd v. Boyd, 66 *Penn. St.*, 283; Durling v. Loveland, 2 *Curt.*, 225).

Now, the suspicions of undue influence and fraud excited by the testimony upon which I have thus far commented have not been removed, but on the contrary have been greatly strengthened, by other portions of the evidence. I do not deem it necessary to review that evidence in detail. It shows that the decedent was of doubtful testamentary capacity at the time with which we are here concerned; that, in the judgment of Dr. Stillwell, she was then near the border line between sanity and insanity, and passed that line soon afterwards; that she "demurred" when Dr. Belden's assistant asked her to execute this pretended will, and said that before signing she wanted time to consider, because its provisions were not quite to her liking; that she repeated her demurrer when for certain reasons assigned by Dr. Stillwell he repeated his request. It *fails* to show who originated this will; whether or not the decedent ever gave instructions regarding it; where it has been since it came into be-

## MATTER OF MORRIS.

ing; how it fell into the possession of the proponent himself.

The paper is not deserving of probate.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—October, 1887.

## MATTER OF MORRIS.

*In the matter of the estate of PETER MORRIS, deceased.*

Decedent, by his will, whereby he undertook to dispose of \$86,000, gave, *inter alia*, to the executors \$45,000 in trust to invest, and apply the income to the use of his widow, A., for life; of this fund, at her death, \$35,000 to go to a son, J., the balance being directed to be held on another trust for a life, at whose expiration, the principal to go to J. The will also gave to A. \$1,000 absolutely, and directed that "the above bequests for the benefit of my wife are not to be diminished," in case the estate proved inadequate to satisfy all the dispositions. The entire estate yielding only \$28,000, whereof A. had the enjoyment, as *cestui que trust*, for life, it was, upon her death,—

*Held*, that the \$1,000 legacy should be paid, in full, to A.'s representative; and the provisions in favor of all the other beneficiaries be subjected to proportional abatement.

The amount of commissions due to an executor and trustee, at the expiration of a trust administered by him pursuant to directions contained in the will—determined.

CONTEST over distribution of trust funds, upon judicial settlement of account of executor of, and trustee under, decedent's will.

BANGS, STETSON, TRACY & McVEAGH, *for executor.*

J. S. GREVES, *for legatees.*

## MATTER OF MORRIS.

THE SURROGATE.—The third article of this testator's will is in substance as follows: I give to my executors \$45,000, in trust, to invest the same, and keep the same invested, and to apply the income thereof to the use of my wife for her natural life; and, after her death, I give the sum of \$35,000, part of said \$45,000, to my son John H. Morris, and I authorize and direct my executors to collect and apply the net income of \$10,000, the balance of said \$45,000, to the use of my sister-in-law, Elisa P. Dykman, for her life; and, after her death, I give the said \$10,000 to my said son John H. Morris.

The fourth article bequeaths a legacy of \$1,000 to the testator's widow and divers other pecuniary legacies to persons therein specified.

Article nine declares that "*the above bequests for the benefit of my wife* are not to be diminished in case my estate shall not be sufficient for all the devises and bequests of this will, but are first to be provided for, and are upon condition that she accept the same in lieu of all dower and right of dower and other claims upon my estate."

It is unnecessary to specify in detail the remaining provisions of the testator's will. By the instrument, as a whole, he undertook to dispose of \$86,000. Of this sum he directed that the executor should hold in trust for the widow, as above stated, the sum of \$45,000; that he should hold the further sum of \$18,000 in trust for other beneficiaries, and should pay the sum of \$23,000 to legatees.

It appears, by a statement of facts to which all persons interested in the present accounting proceed-

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MATTER OF MORRIS.

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ing have agreed, that the assets which have come to the hands of the executor have never been sufficient even to satisfy the trust provision for the benefit of the testator's widow. She died in May last, having been in receipt since her husband's death of the net income of his entire estate. The executor now has in his hands about \$28,000 ready for distribution. What must he do with it to satisfy the provisions of the will?

That the testator, by the ninth article of that instrument, gave a preference to his widow over all other beneficiaries to the extent of the income of \$45,000, or of the whole estate if it should not be of greater value than that amount, is admitted on all hands.

I do not find any expression, implication or suggestion of an intention on his part, that as regards the disposition, after the widow's death, of the fund which should have been theretofore yielding income for her benefit, any person named in the will as a beneficiary should have priority over any other.

I, therefore, hold that all the legacies abate pro rata, with the single exception of the \$1,000 legacy to the widow. Her representative is entitled to receive the same in full.

As to commissions, I understand that the accounting party has already received such sums as are grantable to him by law in his capacity as executor. As the trust for the widow's benefit is terminated, he may properly retain full commissions as trustee upon such portion of the \$28,000 as is now released for distribution to legatees, except the \$1,000 payable to

## MATTER OF HASTINGS.

the widow's representative. He is entitled, I think, to one half commissions for receiving such portion of said \$28,000 as, in accordance with this decision, must be retained in his hands upon the trusts that still remain unexecuted.

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NEW YORK COUNTY.—HON. D. G., ROLLINS, SURROGATE.—October, 1887.

## MATTER OF HASTINGS.

*In the matter of the estate of HUGH J. HASTINGS, deceased.*

Where a testator, in indicating, in his will, the subject of a bequest, uses words which aptly describe property found by the executors among his assets, and are, also, aptly descriptive of property which the latter may purchase without recourse to his estate, the bequest may properly be treated as general. *Contra*, where such subject is a thing which the testator alone possesses.

Testator's will contained a clause whereby he gave and bequeathed, to one nephew "twenty shares of the capital stock of the C. association;" to another nephew ten, and to each of three others five, shares of the same stock, *totidem verbis*. Forty-five shares of the stock described were found among his assets and duly transferred to the legatees. Previously to the transfers, dividends, earned in testator's lifetime, were declared upon the stock of the association, the share whereof, belonging to testator's estate, came to the hands of the executors; upon the settlement of whose account, the residuary legatee insisted that the bequests of stock were general, and had been fully satisfied by the transfers mentioned, it being contended, on the other hand, that the dispositions were specific, and carried the dividends.—

*Held*, that, upon the face of the will, alone, the legacies appeared to be general in their character; but that extrinsic evidence was admissible to show the relation sustained by the testator and his estate towards the subject thereof.

It appearing by such evidence, when introduced, that, at the time of the

## MATTER OF HASTINGS.

execution of the will, it was true, and testator knew, that he alone owned a sufficient number of shares of the stock described to satisfy the bequests,—a like number thereof, other than his own, not being in existence;—and that during the period expiring at his death he not only parted with none of these shares but acquired others,—

*Held*, that these facts were inconsistent with any interpretation of the will other than one involving an intention on testator's part to bestow, specifically, a portion of the very stock which he owned at the time of his death, and that the legatees of the stock took their ratable shares of the dividends, as the increment of specific legacies.

*Tift v. Porter*, 8 N. Y., 516—distinguished.

CONSTRUCTION of will upon judicial settlement of accounts of executors of decedent's will. The facts are stated in the opinion.

*KNEVALS & RANSOM, for residuary legatee.*

*ROSCOE CONKLING, W. K. GRIFFIN, and CRANE & LOCKWOOD, for other legatees.*

THE SURROGATE.—This testator died in September, 1883, leaving a will, that he had executed in January, 1882, whereby he appointed John Hastings, Beverly Ward and Jenkins Van Schaick as his executors. This will was admitted to probate in October, 1883. It contains the following provision:

"I give and bequeath unto my nephew John Hastings son of John Hastings, twenty shares of the capital stock of the Commercial Advertiser Association, and to my nephew Hugh Hastings ten shares of said capital stock, and to my nephew Schoolcraft Hastings five shares of said capital stock, and to my nephew William Hastings five shares of said capital stock, and to my nephew John Hastings son of Richard Hastings five shares of said capital stock."

Executor Van Schaick filed an account of his ad-



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MATTER OF HASTINGS.

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ministration in November, 1884; a separate account was subsequently filed by his two associates. Both these accounts were judicially settled by a decree entered in June, 1885, but by that decree the question upon which I am now to pass was reserved for after-determination.

It appears, by these accounts, that the testator was possessed, at his death, of certain shares of stock, of the very sort specified in the bequests above referred to, and that, in May, 1884, forty-five of such shares were transferred to the aforesaid legatees. Before such transfer was effected, certain dividends were declared upon the capital stock of the Commercial Advertiser Association, and the share of the testator's estate therein came to the hands of his executors. These dividends had been earned during the testator's lifetime. The dividends upon forty-five shares are still undistributed. The executors are not agreed as to the proper distribution of the same, and have, therefore, submitted the matter for the determination of the Surrogate.

It is claimed by counsel for the residuary legatee, that the bequests in question are general legacies, and were fully satisfied by the transfer of the stock; the transferees, as they insist, have no interest in the dividends, and such dividends should be treated as part of the residuary estate.

It is claimed, on the other hand, by opposing counsel, that the bequests to their clients must be regarded as bequests of a portion of the very stock owned by the testator himself in his lifetime, and that, of a consequence, the legatees of such stock are entitled to

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MATTER OF HASTINGS.

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the dividends earned thereon before the testator's death.

Of these two contentions, the former must certainly prevail, if, in ascertaining the character of the bequests in question, the court is confined strictly to the terms of the will, and is not at liberty to resort to any extraneous evidence for the interpretation of its provisions. There is nothing upon the face of that paper to show what were the objects and purposes of the Commercial Advertiser Association; what connection, if any, the decedent had therewith at the time of making his will, and theretofore, and thereafter, and at the time of his death; how many shares, if any, of the capital stock of such association he owned at the date of his will; what was the total number of shares thereof at that time, and at the time he died; whether or not it has been possible for the executors to satisfy the legacies here in controversy without recourse to the very shares whereof their testator died possessed. The will contains no description of the stock bequeathed; the testator does not refer to it as "my" stock, nor has he in any other manner expressly indicated to his executors his wish, that, in the satisfaction of these legacies, resort should be had to any of the identical shares which might form a part of his estate at his decease.

Now there are numerous decisions holding that such bequests, as these appear to be on the face of the will, are not specific but general, and that the mere circumstance that a testator's executors have found among the assets of his estate property precisely answering to the description of property so bequeathed,

## MATTER OF HASTINGS.

does not suffice of itself to give such bequests the quality of specific legacies (*Tift v. Porter*, 8 N. Y., 516; *Robinson v. Addison*, 2 *Beav.*, 515; *Bronsdon v. Winter*, *Ambler*, 57; *Sibley v. Perry*, 7 *Ves.*, 523; *Davis v. Cain*, 1 *Ired. Eq.*, 304; *Gilmer v. Gilmer*, 42 *Ala.*, 9; *Corbin v. Mills*, 19 *Grat.*, 438; *Dryden v. Owings*, 49 *Md.*, 356).

But it is insisted, by counsel for these legatees, that it is the duty of the Surrogate to consider certain extrinsic evidence which they have introduced (under objection and subject to a motion to strike out), which evidence, as they claim, shows a clear purpose of the testator to stamp these bequests with the character of specific legacies. The nature of the evidence in question is to the effect following:

That, at the date of the will, and at the date of its maker's death, the Commercial Advertiser Association was a corporation organized under the laws of this State; that the capital stock of such corporation had, from its creation, consisted of 144 shares, of the par value of \$100 each; that of these shares the testator, at the date of his will, was the owner of 111; that this continued to be substantially the state of affairs until the time of his death, except that he had, in the interval, acquired, jointly with another, the ownership of fifteen shares additional; that, at no time after the execution of his will, would it have been possible, in the event of his death, to have obtained forty-five of such shares outside the assets of his estate; that, for several years before he died, no dividends had been declared upon such stock; that there had accumulated thereon certain profits, from which, about two months

after his death, the trustees of the corporation declared a dividend of \$250 per share.

I understand that counsel for the residuary legatee concede that, in substance, the foregoing propositions are true, though they have reserved the right to offer testimony as to the matters therein stated, in case the Surrogate shall find such testimony competent and material.

Is the evidence heretofore received under objection admissible, and, if so, does that evidence suffice to invest the bequests to the testator's nephews with the properties of specific legacies?

One of the early cases, touching the distinction between general and specific legacies, is that of *Ashburner v. Macguire* (2 *Bro. C. C.*, 108) which was decided by Lord Chancellor THURLOW, in 1786. When I recall what a multitude of judicial decisions I have, from time to time, examined in the investigation of the matter here to be passed upon, and consider how full of bewildering refinements and contradictions those decisions are, I can understand why Lord THURLOW held *Ashburner v. Macguire* under advisement for two years, and why I may visibly be pardoned for dealing in like hesitating fashion with the case at bar.

In opposing the consideration of extrinsic evidence herein, counsel for the residuary legatee invoke the familiar principle, thus formulated by Mr. Jarman in his *Treatise on Wills*, vol. 1, p. 409: "As the law requires a will to be in writing, it cannot, consistently with this doctrine, permit parol evidence to be adduced, either to contradict, add to or explain the contents of such will; and the principle of this rule

## MATTER OF HASTINGS.

evidently demands an inflexible adherence to it, even where the consequence is the partial or total failure of the testator's intended disposition; for it would have been of little avail to require that a will *ab origine* should be in writing, or to fence a testator round with a guard of attesting witnesses if, when the written instrument failed to make a full and explicit disclosure of his scheme of dispositions, its deficiencies might be supplied or its inaccuracies corrected from extrinsic sources." The doctrine thus enunciated has been repeatedly asserted by the courts (King v. Badeley, 3 *Myl. & K.*, 417; Mann v. Mann, 1 *Johns. Ch.*, 231; aff'd, 14 *Johns.*, 1; Taylor v. Wendel, 4 *Bradf.*, 334; Jackson v. Sill, 11 *Johns.*, 201; Bunner v. Storm, 1 *Sandf. Ch.*, 357; Jenkins v. Van Schaack, 3 *Paige*, 242; Sponsler's Appeal, 107 *Penn. St.*, 95).

Mr. Jarman somewhat qualifies this doctrine, in the following proposition, which is supported by numerous decisions: "Though it is the will itself, and not the intention as elsewhere collected, which constitutes the real and only subject *to be expounded*, yet in performing this office a court of construction is not bound to shut its eyes to the state of facts under which the will was made; on the contrary, an investigation of such facts often materially aids in elucidating the scheme of disposition which occupied the mind of the testator. To this end, it is obviously essential that the judicial expositor should place himself as fully as possible in the situation of the person whose language he has to interpret."

Vice Chancellor WIGRAM, in the introduction to his treatise on "Extrinsic evidence in Aid of the Interpre-

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tation of Wills," says: "The question just suggested" (that is the question under what circumstances the admission of extrinsic evidence in aid of the exposition of wills is allowed) "has become much perplexed by want of proper attention on the part both of the courts and of the text writers, to the different purposes to which the admissibility of extrinsic evidence may be applied, and to the different nature of the evidence, which, with reference to such different purposes, parties have tendered for admission. It is said, and correctly, that the statute, by requiring a will to be in writing, precludes a court of law from ascribing to a testator any intention which his written will does not express, and, in fact, makes the writing the only legitimate evidence of the testator's intention. . . . . At the same time, however, courts of law, though precluded from ascribing to a testator any intention not expressed in his will, admit their obligation to give effect to every intention which the will, properly expounded, contains. The answer, therefore, to the question above proposed, enjoined as well as sanctioned by the general principle above mentioned, must be that any evidence is admissible which in its nature and effect *simply explains what the testator has written* ; but no evidence can be admissible which in its nature or effect is applicable to the purposes of showing merely what he intended to write. In other words, the question, in expounding a will, is not what the testator meant as distinguished from what his words expressed, but simply, what is the meaning of the words. And extrinsic evidence in aid of the exposi-

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tion of his will must be admissible with reference to its bearing upon an issue which this question raises."

The learned author further points out the distinction between evidence that is simply explanatory of the words of a will, and evidence by which intention itself is sought to be proved as an independent fact. His "Fifth proposition" (p. 56, 2d Am. ed.) is as follows: "To determine the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, the court may inquire into every material fact, relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and his family and affairs. . . . The same, it is conceived, is true of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can in any way be made ancillary to the right interpretation of a testator's words."

Judge TAYLOR says, in his "Treatise on Evidence" (8th ed., § 1158): "Although extrinsic parol evidence contradicting, varying, adding to or subtracting from the contents of a written instrument is inadmissible, . . . . still parol evidence may in all cases of doubt be adduced to explain the written instrument, or, in other words, to enable the court to discover the meaning of the terms employed and to apply them to the facts. The doubt here adverted to may arise from one or both of the two following causes: Either the language of the instrument may be unintelligible to the court, or, at least be susceptible of two or more

meanings; or the persons or things mentioned may require to be identified."

Again, at § 1194: "It may be laid down as a broad and distinct rule of law, that extrinsic evidence of every material fact, which will enable the court to ascertain the nature and qualities of the subject-matter of the instrument, or, in other words, to identify the persons or things to which the instrument refers, must of necessity be received. Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-matter. With this view, extrinsic evidence must be admissible of all circumstances surrounding the author of the instrument. In the simplest case that can be put—namely, of an instrument appearing on its face to be perfectly intelligible—*inquiry must be made for a subject-matter to satisfy the description.*"

And yet again, at § 1195: "If the court has to determine whether a bequest of stock is specific or pecuniary, it will not only look to the context of the will, and the terms of the gift, but it will also receive evidence of the state of the testator's funded property." All this, of course, subject, as the author declares at § 1201, to the rule that—"Though evidence of circumstances surrounding the author of a written instrument will be received for the purposes of ascertaining his intentions, yet these intentions must ultimately be determined by the *language* of the in-



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strument as explained by the extrinsic evidence; and no proof, however conclusive in its nature, can be admitted with a view to set up an intention inconsistent with the known meaning of the writing itself."

Mr. Spence says, upon this subject, in his "Equitable Jurisdiction" (vol. 1, p. 356): "It is to be observed that in relation to the *subject* of every gift or transfer and the person who is the *object* of the gift or transfer, the words used must be symbols of something extrinsic to the instrument; we must therefore *in all cases* institute an inquiry beyond the instrument in order to ascertain what is meant by the words used." . . . . Where the state of the property will show in what sense the testator has used the words to be found in his will resort may in some cases be had to evidence directed to that point; thus the state of a testator's funded property may be resorted to in order to show whether a bequest of stock is pecuniary or specific."

Now the executors who are here accounting must, of necessity, look outside the will to find what the testator means by capital stock of the Commercial Advertiser Association, and not until they have somewhere found the subject-matter with which his bequests deal, can they satisfy the requirements of the will by turning over those bequests to the legatees. If the introduction of extrinsic evidence in this regard would not only create a doubt as to the character of the legacies where no doubt had existed before, but would also dispel that very doubt by establishing that the legacies must have been intended

as specific and not general, it seems to me that such evidence must be pronounced competent and material.

Many of the older decisions and some of a recent date hold, that in cases like the present parol evidence is only admissible in cases of latent as contrasted with patent ambiguity. This artificial distinction is thus enunciated by Lord Bacon (Rules & Maxims, Regula 23): "*Ambiguitas patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity." This definition of Lord Bacon's is cited by Mr. TAYLOR "more," as he says, "out of respect to that great man than in the expectation that it will afford much practical information." And Judge STORY declared, over seventy years ago, in *Peisch v. Dickson* (1 *Mason*, 9), that he had endeavored in vain to reconcile the conflicting authorities as to latent and patent ambiguity.

Even if we apply to the present case, however, the strictest tests, it can be claimed with much force that there is here an "*ambiguitas latens*" (*Boys v. Williams*, 2 *Russ. & M.*, 689; *Hyatt v. Pugsley*, 23 *Barb.*, 286, 297). For it is the extrinsic evidence, and that alone, which leads to the discovery that, if the testator's death had occurred on any of all the days between the day he executed his will and the day when he in fact died, the legacies to his nephews could only have been satisfied by recourse to the very stock of which he had himself been uninterruptedly the exclusive owner.

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Upon the authority of the cases below cited I have concluded that it is proper to receive evidence of the nature and extent of this testator's estate, and of the circumstances under which he made his will, as an aid in the interpretation of the provisions of that instrument which are here the subject of controversy.\*

SECOND. Having determined that the evidence whose competency is here in dispute must stand, the question next arises whether it suffices to impress upon these bequests of stock the character of specific legacies. [It may be said, in passing, that, if this testator, by the terms of his will as interpreted in the light of extrinsic circumstances, must be held to have virtually instructed his executors to satisfy these stock legacies, after his death, *out of* the very shares of which he

\* Doe v. Hiscocks, 5 M. & W., 363; Abbott v. Middleton, 7 H. L. Cas., 68, 93; Adamson v. Ayres, 5 N. J. Eq., 349, 353; Allgood v. Blake, L. R., 8 Ex., 160; Ashton v. Ashton, Cas. Tem. Tal., 152; Att. Gen. v. Drummond, 1 Dr. & War., 353, 367; Att. Gen. v. Grote, 2 Rus. & M., 609; Avelyn v. Ward, 1 Ves. Sr., 420; Baugh v. Read, 1 Ves., 257; Bond's Appeal, 31 Conn., 183; Boys v. Williams, 2 Rus. & M., 689; Bradley v. Wash., etc., Co., 13 Peters, 89; Brownfield v. Brownfield, 20 Penn., St. 55; Colpoys v. Colpoys, Jacobs, 451; DeNottebeck v. Astor, 13 N. Y., 98; Doe v. Huthwaite, 3 Bar. & Ald., 633; Doe v. Martin, 1 Nev. & Man., 512, 524; Doe v. Roe, 1 Wend., 541; Druce v. Denison, 6 Ves., 385; Earp's Will, 1 Parsons [Penn.], 453; Fish v. Hubbard, 21 Wend., 651; Fonnereau v. Poyntz, 1 Bro. C. C., 472; Gallini v. Noble, 3 Mer., 691; Gannaway v. Tarpley, 1 Cold. [Tenn.], 572; Gilmer v. Gilmer, 42 Ala., 9; Goodhue v. Clark, 37 N. H., 525; Goodtitle v. Southern, 1 M. & S., 299; Grey v. Pearson, 6 H. L. Cas., 61, 106; Guy v. Sharp, 1 Myl. & K., 589, 602; Hampshire v. Peirce, 2 Ves. Sr., 216; Hemling v. Whittam, 2 Sim., 493; Hewson v. Reed, 5 Madd., 451; Hill v. Crook, L. R., 6 E & I. App., 265, 277; Hoyt v. Hoyt, 85 N. Y., 142; Hyatt v. Pugsley, 23 Barb., 286, 297; Innes v. Johnson, 4 Ves., 569; Innes v. Sayer, 3 Mac. & G., 606; Jeacock v. Falkener, 1 Bro. C. C., 296; Kunkel v. MacGill, 56 Md., 120;

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should die possessed and no others, such legacies must be pronounced specific, though they are not distinctly identified in the will either by certificate numbers or otherwise (*Nelson v. Carter*, 5 *Sim.*, 530; *Oliver v. Oliver*, *L. R.*, 11 *Eq.*, 506; *Drinkwater v. Falconer*, 2 *Ves. Sr.*, 623; *Morley v. Bird*, 3 *Ves.*, 628; *Mullins v. Smith*, 1 *Dr. & Sm.*, 204; *Badrick v. Stevens*, 3 *B. C. C.*, 431).]

Upon this question, I shall refer in some detail to several reported decisions. The will which was the subject of construction in *De Nottebeck v. Astor* (13 *N. Y.*, 98) contained this provision: "I give to the six children of my daughter \$100,000 of the public debt called the Water Loan, to be paid to each on attaining their age of twenty-one years." This was declared to be a bequest of \$100,000 to the six chil-

*Lefevre v. Lefevre*, 59 *N. Y.*, 434, 443; *Leigh v. Leigh*, 15 *Ves.*, 92; *Lowe v. Huntingtower*, 4 *Russ.*, 532; *McCorn v. McCorn*, 30 *Hun.*, 171; 100 *N. Y.*, 511; *Martin v. Drinkwater*, 2 *Beav.*, 215; *Metcalf v. Framingham*, 128 *Mass.*, 370; *Morton v. Perry*, 1 *Metc.*, 446; *Norris v. Thomson*, 16 *N. J. Eq.*, 542; *Page v. Young*, *L. R.*, 19 *Eq.*, 501, 506; *Penticost v. Ley*, 2 *Jac. & W.*, 207; *Perry v. Hunter*, 2 *R. I.*, 80; *Postlethwaite's Appeal*, 68 *Penn. St.*, 477; *Pierrepont v. Edwards*, 25 *N. Y.*, 128; *Robinson v. Addison*, 2 *Beav.*, 515; *Rom. Cath. Orph. As. v. Emmons*, 3 *Bradf.*, 144; *Roseboom v. Roseboom*, 81 *N. Y.*, 356; *Ryers v. Wheeler*, 22 *Wend.*, 148; *Sargent v. Towne*, 10 *Mass.*, 303; *Shelton v. Shelton*, 1 *Wash. [Va.]*, 53; *Sherwood v. Sherwood*, 45 *Wisc.*, 357; *Shore v. Wilson*, 9 *Cl. & Fin.*, 355, 356, 366; *Smith v. Burch*, 92 *N. Y.*, 228; *Smith v. Jersey*, 2 *Br. & Bl.*, 473, 553; *Snyder v. Warbasse*, 3 *Stock.*, 463; *Spencer v. Higgins*, 22 *Conn.*, 521; *Stringer v. Gardiner*, 27 *Beav.*, 35; *Stevenson v. Druley*, 4 *Ind.*, 519; *Templeman v. Martin*, 4 *B. & Ad.*, 771, 785; *Terpening v. Skinner*, 30 *Barb.*, 373; 29 *N. Y.*, 505; *Tillotson v. Race*, 22 *N. Y.*, 122; *Webber v. Stanley*, 16 *Com. Bench, N. S.*, 698; *White v. Hicks*, 33 *N. Y.*, 383; *Hutton v. Benkard*, 92 *N. Y.*, 295; *Woods v. Woods*, 2 *Jones Eq.*, *N. C.*, 420; *Wootton v. Redd*, 12 *Grat.*, 196, 205.

dren collectively, and not a bequest of that amount to each of them. In pronouncing the opinion of the Court of Appeals, DENIO, J., while admitting that the verbal construction of the provision seemed to favor the latter interpretation, found argument for the former in the fact that the testator was not possessed of anything like the amount of stock which would be necessary to satisfy the bequest in question as construed by the plaintiff. The learned judge dwelt, also, upon the fact that, in every instance where the testator had bequeathed funded securities, he was the owner of an amount of such stock equal to the sums bequeathed. "To my mind," he declared, "this is satisfactory evidence of the existence of a relation in the mind of the testator between the stocks which he owned and those which he bequeathed, and of a general intention to give only what he at that time had."

In *White v. Hicks* (33 *N. Y.*, 383), there appeared, upon the face of a will, a doubt whether its maker had undertaken to dispose of property touching which he had a power of testamentary appointment. It was held that the court was at liberty to compare the dispositions of the will with the state of the testator's own property, and to deduce therefrom an inference of his intention to embrace in his testamentary gifts the property whereof he was entitled to make disposition under the power. The doctrine of the case last cited was lately reasserted by our Court of Appeals, in *Hutton v. Benkard* (92 *N. Y.*, 295, 301), in these words: "When a will," says EARL, J., "is claimed to be effectual as an execution of a power, all parts of it may be considered and its language and terms con-

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strued in the light of circumstances surrounding the testator at the time of its execution ; and if, from all this it can be seen that it was his intention to execute the power, such intention will have effect."

The New Jersey Court of Errors and Appeals, in *Norris v. Thomson* (16 *N. J., Eq.*, 542), held that certain legacies were specific, upon the following state of facts: A testator gave to his executors, in trust, 750 shares of the capital stock of N. Y. and Baltimore Transportation Line, for the benefit of certain beneficiaries. He also gave to certain trustees five bonds, of \$1,000, each, of the Delaware and Raritan Canal Co. He did not refer to the stock or bonds as his own, or in any other mode declare, upon the face of his will, that the bequests were to be satisfied *in specie* out of his estate. The court said that, as it appeared by the terms of the will, as construed in the light of extrinsic evidence as to the state of the testator's property, that he intended the legacies to be specific, they must be pronounced specific. The rule, that the testator's adjudged intention must be ascertained by the words of his will, was declared to be "not a technical arbitrary rule to be answered only by the use of particular words and expressions," but to be rather "the embodiment of the general principles by which the character of legacies should be tested and determined ; each will resting for correct construction upon the language employed, and *established surrounding significant circumstances if such exist.*"

The opinion of VAN DYKE, J., in this same case, is reported in 15 *N. J., Eq.*, 493. He says: "Another rule, admitted to be universal, is always to be resort-

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ed to in solving these difficult questions, and that is, what was the real intention of the testator. This, if it can be ascertained, is always to govern. In the case before us, if we take the will itself, *together with such other evidence and circumstances as we are permitted to consider*, it seems impossible to conclude that the testator intended these to be general legacies. . . . *But we need only add the fact of the possession of these stocks and bonds by the testator at the time of making the will, and thence to the time of his death, to the language of the will itself, to ascertain the intention of the testator.*"

In *McCorn v. McCorn* (30 *Hun*, 171; *aff'd*, 100 *N. Y.*, 511), it was held that, in determining whether a legacy was or was not a charge upon the testator's estate, "extrinsic facts" and "surrounding circumstances" could properly be taken into account. FINCH, J., in pronouncing the opinion of the court of last resort, dwelt upon the fact that a construction by which the legacies should be treated as not charged upon the real estate would involve a notion, which the court was unwilling to entertain, "that the testator, in making his last will, under the solemnity of approaching death, indulged in bequests known to be useless and vain."

The testator whose will was under consideration in *Kunkel v. MacGill* (56 *Md.*, 120), bequeathed to his daughter, among other things, "\$5,000 of the Wilmington, Columbia and Augusta R. R. Bonds." His will was executed thirteen days before his death. Among his effects, were found five bonds of the kind bequeathed, each of the face value of \$1,000. *Evi*

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dence was introduced showing that the market value of these bonds was about thirty cents on the dollar. It was contended by the legatee that the bequest in her favor was a bequest of \$5,000 in money, with the bonds demonstrated as the fund primarily charged with its payment, or as a bequest of \$5,000 worth of such bonds, with direction to the executors to purchase the same for the legatee. The court, after referring to the inclination of judicial tribunals to construe legacies as general, said: "But, however strong may be the inclination, and into whatever refinements this course of judicial decision may have led, all the cases agree that the governing principle in this, as in all other questions upon the construction of wills, is the testator's intention." The court then reviewed the will as a whole, and discovered therefrom, and from the state of the testator's property, an intention on his part to make the legacy of bonds specific.

In *Colpoys v. Colpoys* (*Jacobs*, 451), it appeared that a testator had bequeathed to each of certain persons "an annuity of £—— long annuities," and to each of divers other persons "£—— long annuities," and the court was called upon to decide whether the latter class of legatees were entitled to long annuities or only to sums of sterling money. In holding to the latter interpretation, great importance was attached to the fact that the whole fortune of the testatrix bore but a small proportion to the value of the bequests in question, if considered as bequests of "long annuities." In commenting upon the question how far that circumstance should be regarded as controlling, the court (Sir THOMAS PLUMER, M. R.) says (p. 463):



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“The admission of extrinsic circumstances to govern the construction of a written instrument is in all cases an exception to the general rule of law which excludes everything *dehors* the instrument. It is only from necessity, and then with great jealousy and caution, that courts, either of law or equity, will suffer this rule to be departed from. It must be the case of an ambiguity which cannot otherwise be removed, and which may, by these means, be clearly and satisfactorily explained. . . . In the case of a patent ambiguity, as a general rule a reference to matters *dehors* the instrument is forbidden. It must if possible be removed by construction and not by averment. But in many cases this is impracticable, as where the instrument furnishes no materials by which the ambiguity thus arising can be removed. If in such cases the court were to reject the only mode by which the meaning could be ascertained, viz.: the resort to extrinsic circumstances, the instrument must become inoperative and void. As a minor evil, therefore, common sense and the law of England (which are seldom at variance) warrant the departure from the general rule and call in the light of extrinsic evidence. The books are full of instances sanctioned by the highest authorities both in law and equity.”

This language is followed by an approving reference to *Doe, dem. Jersey, v. Smith* (2 *Brod. & Bing.*, 553), and to the principle therein stated by BAYLEY, J., as follows: “The evidence here is not to produce a construction against the direct and natural meaning of the words: not to control a provision, distinct and accurately described. . . . I look to the state of the

property at the time, to the estate and interest the settlor had and the situation in which she stood with regard to the property she was settling to see whether that estate or interest or situation would assist us in judging what was her meaning."

*Innes v. Johnson* (4 *Ves.*, 568) was a case in which a testator had given his sister "the full interest of £300 upon bond during her life," and to her daughter at her mother's death "all the interest that shall fairly and justly be due upon the *said* bond," etc., together with the principal. The testator left one bond for £300 and several other bonds in various other sums. It was held by the Master of the Rolls that these legacies were specific. Some stress was laid upon the word "*said*," above italicised, as pointing to this construction, but there is a distinct and positive intimation that even in the absence of that word the court would have reached the same conclusion in case it had appeared that the testator "had only one bond in the world," and that such bond was one of the particular amount bequeathed.

*Ashton v. Ashton* (*Cas. tem. Tal.*, 152) is a case in which a testator had bequeathed to his nephew £6,000, South Sea annuities upon trust, with directions for conversion of the same into money, and for the devotion of the proceeds to purchase of lands to be settled on such nephew for life. The testator left a considerable personal estate, but was shown to have had only £5,360 annuities at the time he made his will. *Held*, that the bequest was specific, apparently upon the ground that it would be absurd to suppose that the testator could have had in mind the purchase by

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his executors of annuities that they would be required to sell again for buying lands, and that, therefore, it must have been his intention to give only the South Sea annuities of which he was possessed. Reference was made, in the early part of this decision, to the case of *Bronsdon v. Winter* (*Amb.*, 56). It was a case in which a testator had made a bequest of "2,000*l* capital stock in the South Sea Company." At the date of his will he was possessed of precisely 2,000*l* in that species of stock and of no more. He sold some portion of this before his death. It was held that the legacy was general and that it had not become adeemed by such sale. In commenting upon this decision, MALINS, V. C., in *Page v. Young* (*L. R.*, 19 *Eq.*, 501), says: "The representation was made in that case that such stock" (*i. e.*, stock of the kind bequeathed) "was not purchasable, and if that had been completely proved it would have been *a very strong circumstance for saying that the testator intended to give that which he then had*. It turned out that the supposition was incorrect."

In *Robinson v. Addison* (2 *Beav.*, 515), a testator, by his will dated in 1819, bequeathed to certain persons shares of stock in the Leeds and Liverpool Canal, aggregating in number fifteen and a half. At the date of the will, he was the owner of precisely that number of shares. He died in 1824, having disposed of the same in his lifetime. Upon the question whether the legacies were specific or general, the defendants were permitted to enter into evidence tending to show that there were infrequent sales of the shares; that they were usually held as permanent

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investments; that they were not commonly brought into the market; had no market price and could not, like stock and other shares in public companies, be purchased through brokers but were generally disposed of by private arrangement. At the argument of the cause, the Master of the Rolls (Lord LANGDALE) announced as his then present impression "that neither the expressions in the will nor the difficulty in purchasing and selling the shares prevented the construction that the legacies were general." After further consideration, he said: "It was argued that the shares of this canal were so rarely brought to market that they could not be considered as transferable or purchasable for money." He then proceeded to comment upon the fact that the canal property, referred to in the bequests, was vested in a corporation, the capital of which was divided into 2600 shares, of which the testator owned only fifteen and one half, and added that "the shares though not frequently sold are nevertheless occasionally bought and sold and *may be had for money*." The gift was construed, therefore, as a gift of "such an indefinite sum of money as would suffice to purchase as many shares as the testator had bequeathed by his will."

The state of facts with which we have here to deal is, so far as I have discovered, without any closer parallels in the reports than are to be found in the foregoing cases. And herein is the most distinguishing feature of the present situation: that, at the time when the testator was making and executing his will, it was true, as he well knew, that there were not

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owned in all the world, save only by himself, as many shares of Commercial Advertiser stock as he was bequeathing to his nephews; that, from that time onward until his death, he did not part with any so held by him, and that during the interval he even acquired possession of several additional shares. This seems to me to be utterly inconsistent with any interpretation of his will other than one involving an intention on his part to bestow upon his nephews a portion of the very stock which he might own at his death.

When a testator, in indicating the subject of a bequest, uses words that aptly describe property which his executors find among his assets, but that are also aptly descriptive of property which they may purchase without recourse to his estate, the bequest may properly be treated as general. But it is otherwise when the subject of the bequest is some article or thing *which the testator, and no person else, has in his possession*. If a bequest of stock "standing in my name" or of "my" stock is specific, how can it fairly be claimed that a bequest of stock which is only procurable as the testator knows by resort to his own assets, lacks the specific quality? Is it not true that such words as are above quoted serve to make specific the legacy in connection with which they are used, simply and solely because the testator's directions can be fulfilled in no other way than by the transfer to the legatee of the very thing, (being parcel of the testator's estate) which is given him by the legacy.

The distinction between the facts here appearing

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and those disclosed in such cases as Bronsdon v. Winter (*supra*) and Robinson v. Addison (*supra*) is well pointed out by counsel for one of these legatees. "Where the shares," he says, "are in a public company, the sources of possible supply are indefinitely numerous, but in the present case there being but one source of possible supply existent, and this source the estate of the testator," the reason of the rule applicable to ordinary cases utterly fails.

If, in Tift v. Porter (*supra*), upon which counsel for the residuary legatee specially relies, the testator had owned substantially all the stock of the Cayuga Bank, I cannot doubt that the court would have arrived at another conclusion than the one which was there reached. If the question whether the legacies here in dispute are specific were *res integra*, I should scarcely regard it as in the least doubtful; as it is, the weight of authority is in favor of the claim of the legatees. A decree may be entered, on two days' notice, in accordance with this decision, unless, pursuant to the understanding with counsel when the case was submitted, any of the parties hereto wish in the first instance for special rulings upon offers of evidence.

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MATTER OF BLACK.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—November 1887.

MATTER OF BLACK.

*In the matter of the estate of ROBERT BLACK, deceased.*

Decedent died in New Jersey, leaving assets in New York county, the Surrogate's court whereof granted letters of administration of his estate. Subsequently, a will was proved in a domiciliary court, and ancillary letters were issued, here, to the foreign executrix. Upon a settlement of the administrator's account,—

*Held*, that credit should not be allowed for any disbursements representing expenses incurred in contesting the foreign probate.

Administrators, in such a case, being liable to be required at any time to pay over funds collected, will not be mulcted in interest as a penalty for not making investments.

HEARING of objections, interposed to account of administrators, filed in proceedings for judicial settlement.

H. Y. CUMMINS, *for administrators.*

O. FRISBIE, *for ancillary executrix.*

THE SURROGATE.—This decedent died in the State of New Jersey, and left a will which has there been duly admitted to probate. The will has also been recorded in the Surrogate's court of this county, and ancillary letters testamentary have here been issued.

The decedent left assets in this county, and before the will was admitted to probate the two persons here accounting took out letters of administration. They

now claim credit for certain disbursements, which credit is objected to by the ancillary executrix. A portion of the amount in dispute is stated to have been expended in contesting the probate of the will in New Jersey. It is very clear that the accounting parties, as administrators, had no right to expend the funds of the estate in that contest, and while the accounting administratrix in her capacity as one of decedent's next of kin, may have incurred expense in the New Jersey proceedings, her claim to reimbursement out of the estate should have been presented to the New Jersey court, and cannot here be considered. This credit must therefore be disallowed.

The other disputed item concerns counsel fees and disbursements in New York. Although the amount is small, I do not see how the credit can be allowed, without better evidence that such expenditure was necessary than is afforded in the papers before me. The attorney for the administrators presents a bill of costs in the present proceeding, in which he includes as disbursements certain payments on account of the probate contest in New Jersey. Such payments cannot be treated as disbursements in this proceeding, and they must be disallowed; it is not clear but that all of the disbursements set forth in the account are connected with the controversy in New Jersey; they must, therefore, be disallowed altogether. In view of the inconsiderable value of the estate, and in view of the fact that the assets collected by the administrators consist of only two items, and that, apart from matters relating to the New Jersey probate litigation, the accounting parties appear to have made but one



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MATTER OF NESMITH.

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payment, I think that they can be granted as costs no more than \$25, and as an allowance for preparing the account no more than \$10. The decree may award them those amounts.

In view of their liability to be required at any time to pay over the funds in their hands, I do not think they can properly be charged with interest because of their failure to make investments, especially as they are not shown to have reaped any personal advantage from their negligence.

Let a decree be entered in accordance with this decision.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—November, 1887.

MATTER OF NESMITH.

*In the matter of the estate of LOUIS A. NESMITH, deceased.*

In fixing the penalty of the bond of an administrator, *c. t. a.*, about to succeed an administrator appointed as in case of intestacy, regard must be had to the amount of an unpaid legacy, although the assets, wherewith to satisfy it may have been distributed among the next of kin.

A legacy of "one thousand," without further words of description, will, for the same purpose, be deemed to mean \$1,000, in view of the circumstance that the beneficiary's rights might be so adjudicated, in a proper proceeding, by a competent tribunal.

APPLICATION to fix penalty of bond of administrator, with the will of decedent annexed.

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MATTER OF NESMITH.

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GEO. P. SMITH, *for administrator.*

J. K. HAYWARD, *opposed.*

THE SURROGATE.—The will of this decedent having been admitted to probate, and it having been heretofore decided that Mary D. Nesmith is entitled to letters of administration, *c. t. a.*, I am now asked to fix the amount of the administration bond. Before probate of the will, letters of administration, as in case of intestacy, were issued to Frank M. Nesmith; it is claimed that he had fully administered the estate before his letters were revoked by reason of such probate.

By one of the provisions of the will, a legacy is given to Martha Manderson, which legacy it is admitted has not been paid. It is true that the administrator, *c. t. a.*, cannot recover from any of the decedent's next of kin the moneys which have been paid to him or her by the former administrator, but it is by no means clear that a judgment for the full amount of Mrs. Manderson's legacy may not be recovered against such former administrator. It is insisted that, because he gave a bond in the sum of \$400 only, the penalty of the bond which can now be exacted should not exceed double that amount. It is true that no recovery can be had, against the sureties on the \$400 bond, in excess of that sum, but the claim against the administrator is not thus limited.

It is further insisted that Mrs. Manderson has no interest in this estate, because of an alleged uncertainty appearing on the face of the will. The will directs that she be paid a legacy of "one thousand"; the

## MATTER OF BULLOCK.

word dollars is not used by the testator. It was held by the chancellor in *Snyder v. Warbasse* (3 *Stockt.*, 463), that the omission of the word "dollars," under circumstances similar to the present, was palpably a mistake of the scrivener; that the testator's intention to use that word was apparent on the face of the will, and that the court had full jurisdiction to supply the omission. The respondent is correct in his insistence that, in the present proceeding, the Surrogate cannot construe the word "dollars" into this testator's will; but, in fixing the penalty of the bond of the administrator, *c. t. a.*, it is proper to assume that the petitioner's contention in this regard *may* be upheld.

I hold, therefore, that bond must be given in the sum of \$2,000.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—November, 1887.

## MATTER OF BULLOCK.

*In the matter of the estate of JAMES B. BULLOCK, deceased.*

Where the will of a resident of this State is sufficient in form, and not repugnant in its dispositions to the *lex domicilii*, it will be sustained by our courts; and the capacity of a non-resident beneficiary, whether a natural or an artificial person, to take a bequest or devise therein contained, will be determined by the law of the State of his residence. The will of testator, who died domiciled in this State, bequeathed \$5,000 to "the congregational church in the town of S., in the county of W.,

## MATTER OF BULLOCK

and the commonwealth of Massachusetts," adding words further tending to identify the intended legatee. It appeared that there was a religious body, answering to the description, which, however, was not incorporated. But a local statute, in force when the will was executed, and still unrepealed, provided that certain designated officers of religious societies, which this church possessed, should be deemed bodies corporate, for the purpose of taking donations made to them or their respective churches.—

*Held*, that the capacity of the church described to take the legacy was to be tested by the law of Massachusetts, and that the disposition in its favor was in all respects valid and effectual.

CONSTRUCTION of will, upon judicial settlement of executor's account. The facts are stated in the opinion.

MITCHELL & MITCHELL, *for executor*.

H. W. GRINDAL, *for corporation*.

THE SURROGATE.—The second account of the executor of this estate is before me for judicial settlement.

Certain questions are presented for my determination respecting the validity of the fourth article of the testator's will, which is in the words following:

"I give and bequeath unto the Congregational Church, in the town of Sturbridge, in the county of Worcester and the Commonwealth of Massachusetts, where my dear parents worshipped for so many years, the sum of \$5,000, and to the pastor who may preach and officiate therein at the time of my death the further sum of \$500."

It is claimed in behalf of the residuary legatees that the foregoing bequest of \$5,000 is invalid and ineffectual because there is not now in existence and

## MATTER OF BULLOCK.

was not in existence at the testator's death any *corporation* known as "The Congregational Church of Sturbridge, Massachusetts," or any *corporation* that the testator could have had in mind in making the disposition here in question.

It is established to my satisfaction that there now exists in the said town of Sturbridge a church *organization* known as the Congregational Church of that town; that this church organization has existed for over a hundred years; that testator's parents once resided in said town and were in the habit of attending religious services at said church, and that said church is the very church which the testator by the fourth article of his will intended to benefit.

It is admitted by counsel, who insists upon the validity of this legacy, that the church in question has never been formally incorporated under the laws of the State of New York, or of the State of Massachusetts, but he nevertheless insists that it is in substance and effect a corporation, or that its deacons are a corporation, and that the one or the other corporation is competent as such to take a bequest, because of the following provision of the Public Statutes of Massachusetts, ch. 31, § 1: "The deacons, churchwardens or other similar officers of churches or religious societies, shall, if citizens of this commonwealth, be deemed bodies corporate for the purpose of taking and holding in succession all grants and donations, whether of real or personal estate, made either to them and their successors, or to their respective churches or to the poor of their churches." This provision was

## MATTER OF BULLOCK.

upon the statute book of Massachusetts at the date of the testator's will, and stands unaltered to-day.

The evidence shows that Henry Haynes and W. G. Reid, both of whom are residents of the town of Sturbridge, are deacons of the Congregational Church to which the testator refers in his will.

The matters to be decided upon the facts above stated are these :

*First.* If the testator had made a bequest like the one in controversy to some unincorporated church in the State of New York, would such a bequest be valid if there were here in force a statutory provision like that above quoted ? If this question be answered in the affirmative, then

*Second.* Should the capacity of the Sturbridge church to take be tested by the law of Massachusetts ?

As regards the first of these questions, there are several decisions of Massachusetts courts, which though not here controlling are nevertheless deserving of consideration. It was held by the Supreme Court of that State, in *Weld v. May* (9 *Cush.*, 181), that "if grants or donations are intended for a church, whether the gift be in form to the poor of the church or to the church itself, the deacons are a body politic to take and hold the same."

"These consequences," said SHAW, C. J., pronouncing the opinion of the court, "are considered as necessarily following from the fact of the existence of a church" (citing *Sawyer v. Baldwin*, 11 *Pick.*, 492). . . . "When legally chosen, the law vests in him" (the deacon) "the powers necessary to accomplish its purposes, that of taking and holding property for a

## MATTER OF BULLOCK.

known aggregate body not incorporated. . . . Looking at the church in this case as a body of individuals, they do not hold property to their own use, but their deacons are invested with powers to supply such deficiency in the legal constitution of a church."

In *Stebbins v. Jennings* (10 *Pick.*, 172), twenty years prior to the decision of the case last cited, SHAW, C. J., said: "When they," (*i. e.*, churches) "became numerous, and the property incident to their beneficial operation considerable, an express legal provision was made by the act of 1754, enacting that the deacons, for the time being, should be a body corporate, with power to take and hold property for the use of the church, and to transmit it to their successors for the like purpose—which law has ever since been in force. No implied corporate powers, therefore, are necessary to enable a church to hold property, because, by this statute, express provision is made for the taking, holding and transmission of property in which the church is beneficially interested. . . The statute was professedly made for the better recovery of grants and donations to pious and charitable uses, for the better support and maintenance of ministers, and the defraying of charges relating to public worship. Two objects were to be accomplished: one to give all such grants a legal effect and operation by enabling the grantee to take and hold real and personal property, the other that such property should go in succession."

I see no reason to dissent from the doctrine established by these Massachusetts cases, and therefore give an affirmative answer to the first of the two questions above stated.

## MATTER OF BULLOCK.

I am also of opinion that, in passing upon the competency of the Sturbridge church or its deacons to take this disputed bequest, regard must be had solely to its or their competency in the State of Massachusetts.

"Corporations organized under the laws of a sister State are recognized by the courts of New York as entitled to take devises and legacies under the will of a resident of this State, whenever, by the laws under which they are created, such corporations have authority to acquire property by will, unless such devises or legacies are repugnant to our own laws" (*Draper v. Harvard College*, 57 *How. Pr.*, 269; *Kennedy v. Palmer*, 1 *T. & C.*, 581; *Harris v. Am. Bible Soc.*, 4 *Abb.*, *N. S.*, 421; *Sherwood v. Am. Bible Soc.*, 1 *Keyes*, 565; *Riley v. Diggs*, 2 *Dem.*, 184; *Chamberlain v. Chamberlain*, 43 *N. Y.*, 524).

It was distinctly held in the case last cited that the fact that a certain corporation named as a beneficiary in the will of a testator residing in New York was a charitable corporation created by the laws of a foreign State, and that the bequest thereto was for charitable purposes did not make such bequest invalid. It was further held that, while the courts of New York could not administer a foreign charity, they could direct legacies in favor of such charity to be paid to the proper parties, leaving it to the courts of the foreign State to provide for its due administration.

Said ALLEN, J., pronouncing the opinion of the court, "If within the *lex domicilii* of the testator a will has all the forms and requisites to pass the title to personalty, the validity of the particular bequests will depend upon the law of the domicil of the legatee and



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MATTER OF BULLOCK.

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of the government to which the fund is by the terms of the will to be transmitted for administration, and for the particular purposes indicated by the testator. . . . A bequest in aid of foreign charities valid and legal in the place of their existence will be supported by the courts of the State in which the bequests are made. If the legatee, whether a natural or artificial person, and whether he takes in his own right or in trust, is capable by the law of his domicile to take the legacy, in the capacity and for the purposes for which it is given, and the bequest is in other respects valid, it will be sustained, irrespective of the law of the testator's domicile; subject, however, to this qualification, that if the law of the testator's domicile, in terms, forbids bequests for any particular purpose, or in any other way limits the capacity of the testator in the disposal of his property by will, a gift in contravention of the law of the testator's domicile would be void everywhere."

For the foregoing reasons this testator's bequest to the Sturbridge Church must be pronounced valid and effectual."

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MATTER OF LAWRENCE.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—November, 1887.

MATTER OF LAWRENCE.

*In the matter of the estate of WILLIAM S. LAWRENCE, deceased.*

A Surrogate's court has no authority to make an order requiring a testamentary trustee to give a bond, although a breach of trust may have been committed, unless the complainant demonstrates the existence of circumstances which would justify a demand of security from an executor (Code Civ. Pro., § 2815).

APPLICATION for order compelling testamentary trustee to file official bond.

ALEXANDER & GREEN, for trustee.

THE SURROGATE.—This is an application for an order requiring the testamentary trustee under the will of William Lawrence deceased to give security for the due performance of his trust. The proceeding is brought by Isaac Lawrence, to whose use for life the testator's will directs the application of one tenth of his residuary estate.

The will was admitted to probate in February, 1865; in October, 1867, the accounts of its executor were judicially settled and determined, and since that date the respondent has been chargeable, in his capacity as trustee, for the funds of the estate in his hands. In December, 1886, this petitioner applied for

## MATTER OF LAWRENCE.

an order directing the respondent as such trustee to account. Such proceedings have since been had that the trustee has filed his account, and has also filed a "statement" setting forth that, in the year 1872, he *invested* the trust funds held by him in certain railroad bonds guaranteed by the Pennsylvania Railroad Co.; that this guaranty was soon afterwards repudiated; that the bonds thereupon became well nigh worthless; that he (the respondent) has ever since "assumed the entire burden of the loss, and has treated the estate as cash in his own hands, and has continued to pay interest thereon at the legal rate." In this so called "statement," the trustee declares his ability and willingness, upon reasonable notice, "either to invest a sum representing the *corpus* of the estate in bonds and mortgages or in such other securities as the Surrogate may order, or to turn over the amount in cash to such person as may be appointed his successor."

By the present proceeding, the petitioner does not ask for the removal of this trustee for breach of trust, but merely asked for an order directing him to file a bond. Now I cannot, within the limitations of § 2815 of the Code of Civil Procedure, grant the relief here asked, upon the grounds alleged in the petitioner's application. Section 2815 expressly declares that an order to file a bond may be made in cases "where a person named as executor can entitle himself to letters testamentary by giving a bond, *but not otherwise.*" The cases thus referred to are specified in § 2638 of the Code. They are cases where the applicant for letters is a non-resident of the State, or

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MATTER OF ODELL.

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"where his circumstances are such that they do not afford adequate security . . . for the due administration of the estate." There is nothing in the allegations of this petition to show that the case at bar is within either of these categories.

Application denied.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1887.

MATTER OF ODELL.

*In the matter of the estate of LAWRENCE ODELL, deceased.*

A witness cannot be punished for a contempt, for refusing to answer a question immaterial and irrelevant to the issue upon the trial whereof he is examined.

MOTION to punish witness for contempt for refusing to answer question on hearing before referee.

BILLINGS & CARDOZO, *for the motion.*

JACOB FROMME, *for executrix.*

THE SURROGATE.—The referee, before whom are now pending the issues of an accounting proceeding in this estate, lately granted an order to show cause, returnable before the Surrogate, why a witness should not be punished for contempt for refusing to answer

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MATTER OF ODELL.

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a question propounded to her by counsel for the contestant at one of the recent hearings before such referee. Certain preliminary objections are made, on behalf of the witness, to the manner in which the question of her alleged contumacy is now brought before the court. It seems unnecessary, however, to pass upon these objections, in view of the conclusions I have reached upon the merits.

The question, which the witness refused to answer, was the following: "Please look at the paper which I now show you, the first entries of which are under date February 14th, 1882, and say whether it is a copy of your account with the Pacific Bank in this city." To this question counsel for the executrix objected, whereupon counsel for the contestant stated, as appears by the stenographer's minutes, that he wished an answer to the question "for the purpose of laying a foundation for attempting to prove that a portion of the rents of Lawrence Odell's" (*i. e.*, the decedent's) "property went into the private account of Mary J. Odell"—meaning Mary J. Odell, the witness, who is also the executrix of the estate.

It appears that the decedent died in March, 1886. Whether, during the four years next preceding his death, the executrix had or had not collected moneys belonging to him is not material to any issue properly raised by the account and the objections thereto.

This motion must, therefore, be denied.

MATTER OF NAY.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1887.

MATTER OF NAY.

*In the matter of the estate of JOSEPH O. NAY, deceased.*

An executor or administrator cannot proceed to the collection of an ordinary debt, by means of the machinery provided by Code Civ. Pro., § 2706, *et seq.*, relating to the discovery of property concealed or withheld.

PETITION for order requiring respondent to attend and submit to examination.

THE SURROGATE.—This is a discovery proceeding under § 2706 of the Code of Civil Procedure. The petitioner alleges that, upon an examination of the books, memoranda and returned checks of the decedent, it has been discovered that one John Dunne, the person herein cited, is in possession of a large sum of money, to wit, nine hundred dollars, belonging to the decedent's estate. A verified answer has been interposed by Dunne, in which, after denying the allegations of the petition, he insists that he is "the owner of said sum of money, to wit, nine hundred dollars, mentioned in said petition."

If the petition is to be interpreted as referring to and describing any particular definite parcel of coins, treasury notes, or bank bills, it is the duty of the Surrogate, in view of the interposition of the answer

MATTER OF M'MULKIN.

to dismiss the proceeding (Code Civ. Pro., § 2710). A like direction should be given, if the petition is to be interpreted, as simply alleging an indebtedness on Dunne's part to the decedent's estate. The procedure established by §§ 2706-2714 was not designed to enforce the collection of debts.

Petition dismissed.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SHERIFF.  
GATE.—December, 1887.

MATTER OF McMULKIN.

*In the matter of the application for probate of a paper propounded as the will of MARY McMULKIN, deceased.*

Upon an application for the probate of the alleged will of decedent, it appeared, from the depositions of B. and C., the subscribing witnesses, that they severally wrote their names as such, on the paper propounded, and that decedent, in their presence, declared the same to be her will. The deposition of one, S., further disclosed the facts that decedent had acquainted him with her purpose "to settle" some money she had in America, and, on being informed that two witnesses would be necessary, had asked deponent to find "two responsible working men," to act in that capacity; that deponent had waited upon B. and C., obtained their consent to witness the execution, and promised to notify them when to attend, afterward reporting the result to decedent, who said "all right." There was no attestation clause.—

*Held*, in the absence of evidence that B. and C. had been actually summoned,—that their subscription was personally observed or requested by decedent,—or that the latter took charge of, or ever saw, the paper after execution,—probate must be refused for want of proof of the request required by 2 R. S., 63, § 40, subd. 4.

The paper propounded as decedent's will purported to have been executed by cross-mark, was unaccompanied with an attestation clause, and

## MATTER OF M'MULKIN.

presented, at its end, the names and residences of the subscribing witnesses and the name and mark of decedent, in a confused jumble, which afforded no clue as to the order of time in which the several signatures had been affixed. In the absence of explanatory evidence,—

*Held*, that probate must be refused for want of proof that the subscription by decedent preceded, in time, the acts of the attesting witnesses.

PETITION for probate of a will. The facts are stated in the opinion.

L. H. ARNOLD, *for proponent*.

E. CONWAY, *special guardian, for contestants*.

THE SURROGATE.—When the proofs theretofore taken herein were submitted, in June last, for the consideration of the Surrogate, they were deemed by him insufficient to show that the subscribing witnesses to this alleged will acted as such witnesses at decedent's request; but, for reasons stated in the Surrogate's memorandum of June 29th, the proponents were allowed to submit additional evidence in that regard. A commission was subsequently issued for taking the deposition of Thomas Slavin, the husband of one of the persons named as beneficiary in the disputed paper.

Slavin was examined before the commissioner. His testimony is substantially as follows: Two or three days prior to November 14th, 1885 (the day when such paper was executed), and prior, indeed, to the preparation of such paper, the decedent said to him that she "had some money in America and wished to settle it." Slavin thereupon asked her if she wished any one sent for, to draw up her will. She replied that Father Campbell, a priest of her acquaintance,



## MATTER OF M'MULKIN.

had said that he would prepare it. Slavin then inquired if she had in mind any persons to act as witnesses, telling her that two such persons would be needed. She answered in the negative, and asked him to find "two responsible working men," to perform that service. Slavin then suggested the names of Thomas Conlay and Patrick Boyle (the same persons whose names appear on the alleged will as its subscribing witnesses) and offered to see both of them, and to "see if they had any objections." The decedent said: "Do so." Afterward, Slavin waited upon Thomas Conlay, and "asked him if he had any objection to becoming a witness for a will that Mary McMulkin had expressed a wish to make." Conlay replied: "Not in the least." Slavin subsequently called upon Patrick Boyle, addressed to him the same inquiry that he had put to Conlay, and with like result. Slavin said, to both Conlay and Boyle, that he would let them know when they would be wanted, but it does not appear by the testimony that this promise was ever fulfilled. In answer to the question whether he, Slavin, had made any appointment with Conlay and Boyle, he testified: "I did not make any appointment as to the hour; I have related all that was said by them and by me at the time. I told Mary McMulkin, at a convenient opportunity, that I had spoken to the persons proposed for witnesses, and that they had consented. She said 'All right.'"

It appears, from the depositions of Conlay and Boyle taken under the first commission, that they severally wrote their names as witnesses to the paper propounded, and that the decedent, in their presence and hear-

ing, declared the paper to be her will. It does not appear, however, that she in terms requested either of them to act as subscribing witnesses. It does not appear that there was any conversation between either of them and herself, in which Slavin's name was mentioned, and in which his agency in securing their attendance was the subject of comment. It does not appear at what precise stage in the ceremonies of execution the subscribing witnesses signed, nor whether or not the decedent actually saw them or either of them put their names to the paper, or handed them the paper, or pen, or ink, or did any other act involving an intimation of a wish that they should use pen or ink in writing upon the paper; nor is it shown whether or not the decedent took charge of such paper after its execution, or ever saw it after it had been executed.

I have grave doubts whether, in view of these facts, and in the absence of any clause of attestation, I am warranted in finding, that, within the meaning of our statute of wills, the decedent *requested* Conlay and Boyle or either of them to act as subscribing witnesses. I am referred to no reported cases in this State which seem to me to give to that statute an interpretation sufficiently broad to support this proponent's contention in the matter now under discussion and, have, therefore, though with some hesitation, reached the conclusion that the execution of this instrument is fatally defective and that it must be denied probate.

Upon careful consideration of the evidence as a whole, I am persuaded also that there is another sub-

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MATTER OF M'MULKIN.

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stantial ground for denying the proponent's petition. It has been unequivocally declared by our Court of Appeals, that a testamentary paper cannot be accorded probate, unless the signature of the would-be testator has preceded, in point of time, the signature of the attesting witnesses (*Jackson v. Jackson*, 39 *N. Y.*, 153; *Sisters of Charity v. Kelly*, 67 *N. Y.*, 409; *Dack v. Dack*, 84 *N. Y.*, 663). Now it is well settled that, in all cases, the burden of proof is upon the proponent of an alleged will to show its due execution. It is doubtless true that, whenever, in the course of a probate trial, there has been no avowed contention in respect to the order of signatures, and no inquiry of witnesses touching that subject, the trial court may properly be content with slight proof that the alleged testator signed before, and not after, the subscribing witnesses. For example, in cases where there is a full attestation clause its recitals will be treated as affording presumptive evidence in that respect.' So too the circumstance, if such circumstance exist, that upon the face of the disputed paper the signature of the alleged testator precedes the signature of the subscribing witnesses, raises a presumption that the first signature in point of space was the first in point of time. But in the case at bar, I find no facts or circumstance that afford a basis for a presumption in behalf of the proponent, and, as has been already stated, the testimony of the subscribing witnesses fails to disclose or intimate whether they wrote their names before the decedent's subscription or afterwards. The instrument has no attestation clause, and bears on its face no satisfactory evidence upon the question of the order of signa-

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### MATTER OF HUIELL.

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tures; it is written upon ruled paper, and the appearance of its last six lines is as follows:

In witness whereof I have ~~signed~~ subscribed this will  
this 14th day of November eighteen hundred and eighty-  
five years, before these witnesses, Thomas Conlay Stok-  
taker 54 Northwoodside road- Witness her  
Patrick Boyle spirit salesman Mary + McMulkin  
13 Raglan Street Witness mark

It is very possible that Mary McMulkin made her mark on this paper before Thomas Conlay wrote his name as witness, but there is no *proof* that such is the case, and so far as the paper affords any internal evidence at all in the matter, it makes for the contestants rather than for the proponent.

Probate refused.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1887.

### MATTER OF HUIELL.

*In the matter of the estate of* AUGUSTA C. HUIELL,  
*deceased.*

The provisions of 2 R. S., § 49, as amended in 1869, respecting the rights of an "after-born" child of a "*testator*," must be deemed to apply where the will is that of the *mother* of the one invoking the protection of the statute.

Where an alleged will of a decedent is contested by a child born after its execution, the Surrogate's court has jurisdiction to determine whether the latter is "unprovided for by any settlement," within the meaning

## MATTER OF HUIELL.

of 2 R. S., 65, § 49. Only in case such issue is determined in the negative, has contestant any *status*, as an opponent of probate.

J. V. HUIELL, *executor, in person.*

J. D. WARNER, *special guardian.*

THE SURROGATE.—Section 49 of title 1, chapter 6, part 2, of the Revised Statutes (3 Banks, 7th ed., 2287) provides that “whenever a testator shall have a child born after the making of a last will, either in the lifetime of or after the death of such testator, and shall die leaving such child, so after born, unprovided for by any settlement, and neither provided for nor in any way mentioned in such will, every such child shall succeed to the same portion of such *parent’s* real and personal estate as would have descended or been distributed to such child if such *parent* had died intestate, and shall be entitled to recover the same portion from the devisees and legatees, in proportion to and out of the parts devised and bequeathed to them by such will.”

There is no doubt that this provision, as amended by chapter 22 of the Laws of 1869, is applicable to estates of testatrices, no less than to estates of testators.

This decedent left, her surviving, two children, one of whom, Florence by name, was born after the making of the paper propounded for probate as the mother’s will. That paper makes no provision in Florence’s behalf nor any mention of her name. This circumstance though coupled with the fact, if it be a fact, that Florence was left by her mother “unprovided for by any settlement,” affords no valid grounds

MATTER OF HUIELL.

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of objection to the probate of the paper here propounded (Matter of Gall, 5 *Dem.*, 374; Matter of Bunce, *ante*, 278).

No proofs have been submitted upon the question whether or not the decedent made any settlement upon the child whose rights are now the subject of consideration. There can be no doubt, I think, that the Surrogate has jurisdiction to determine that question, in view of the fact that, upon its determination, depends the further question whether Florence has any *status* to contest this alleged will. If it shall be ascertained that, within the meaning of § 49, *supra*, a "settlement" was in fact made for her or for her benefit, then she is *not* by virtue of that section, entitled to the share in the mother's estate which would have been hers in case of her mother's intestacy, and is entitled, therefore, to oppose probate of this alleged will upon any grounds affecting its legality and validity.

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MATTER OF JOHNSTON.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1887.

MATTER OF JOHNSTON.

*In the matter of the estate of JOHN JOHNSTON, deceased.*

A guardian ad litem, in a Surrogate's court, will employ counsel at his own expense.

SETTLEMENT of decree admitting will to probate.

THE SURROGATE.—The decree proposed by counsel for the proponent herein makes provision for the award of \$250, as compensation to special guardian Prentiss, for his services in behalf of certain infant heirs at law and next of kin of the testator. I think that similar provision should be made for the compensation of special guardian Spelissy for his services in behalf of other infants.

It has never been the practice of this court to make any allowance to a special guardian for his counsel fees and the application made for such an allowance in the case at bar must be denied.

I have signed and settled a decree admitting the testator's will to probate and directing the issuance of letters testamentary to the executor. I have adopted and signed the findings of fact and conclusions of law proposed by proponent's counsel as the "decision in writing" contemplated by Code Civ. Pro., § 2545 (Matter of Hoyt, 5 Dem., 284).

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MATTER OF CONNER.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1887.

MATTER OF CONNER.

*In the matter of the estate of JAMES M. CONNER, deceased.*

The only dispositive provision of testator's will directed the "executors and executrix to distribute and apportion to my (his) wife and children my (his) estate, *in such manner*," and at such time as they judged to be for the best interests of his wife and children, with power to sell, and distribute the proceeds as they should deem best for the interests of all. The widow and three of the children were nominated executrix and executors. The remaining three children were infants.—

*Held*, that the beneficiaries were entitled to equal shares of the estate.

FOSTER & STEPHENS, *for proponents*.

W. H. HAMILTON, *special guardian*.

CONSTRUCTION of will upon application for probate.

THE SURROGATE.—The paper propounded as this decedent's will is entitled to probate. Its only dispositive provision is in these words: "I hereby direct my executors and executrix to distribute and apportion to my wife and children" (then follow the names of the children, six in number, of whom three are yet minors) "my estate, *in such manner* and at such time or times as shall in their judgment be for the best interests of my wife and children, giving unto my executors and executrix full power to sell such and so



## MATTER OF CONNER.

much of my real and personal property as they shall deem best, and to invest or distribute the proceeds of such sale as they shall deem best for the best interests of all."

Three of the testator's children are then named as executors, and his wife is appointed executrix. I am asked by the special guardian of the infant children to construe the provision above quoted. He insists that it merely confers upon the decedent's representatives the authority contemplated by § 98 of title 2, chapter 1, part 2, of the Revised Statutes (3 Banks, 7th ed., 2191). It is by that section provided that, "Where a disposition under a power is directed to be made to or among or between several persons, *without any specification of the share or sum to be allotted to each*, all of the persons designated shall be entitled to an equal proportion."

It is claimed, on the other hand, by counsel for the proponents, that the will gives absolute authority to the executors and not merely a power in trust; and that, even if it must be interpreted as giving a power in trust, the character and extent of such power must be ascertained, not by reference to § 98 (*supra*), but by reference to § 99 of the same title. That section is as follows: "But when the terms of the power import that the estate or fund is to be distributed between the persons so designated *in such manner or proportions as the trustee of the power may think proper*, the trustee may allot the whole to any one or more of such persons, in exclusion of the other."

This is a holographic will. Its language does not satisfy me that its maker intended to empower his

executors to appropriate his entire estate to their own use, to the utter exclusion of two of his infant children, even though, in the exercise of their discretion, the executors should think that such appropriation would be for the best interests of such infant children, as well as of themselves. In prescribing that the distribution and apportionment should be made "in such manner" as should commend itself to the judgments of his executors, the testator did not, it seems to me, give or intend to give, any direction in respect to the *proportions* in which his beneficiaries should share his estate.

I hold, therefore, that they are all entitled to share equally in the ultimate distribution.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1887.

UNION TRUST CO. v. GAGE.

*In the matter of the estate of NATHANIEL GILMAN, deceased.*

A Surrogate's court cannot enforce a direction for the payment of money, by proceedings to punish for contempt, until after the return, unsatisfied, of an execution against the property of the alleged delinquent (Code Civ. Pro., §§ 2554, 2555).

Personal service of a copy of an order directing the payment of money, is not a "personal demand" of payment, within the meaning of Code Civ. Pro., § 2268, which permits a warrant of commitment to issue, in certain cases, where such a demand has been made, and payment neglected or refused.

UNION TRUST CO. V. GAGE.

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APPLICATION to punish parties for contempt, in disobeying order directing the payment of money.

R. J. MOSES, *for petitioner.*

BLISS & SCHLEY, and S. G. REED, *for respondent.*

THE SURROGATE.—On June 26th, 1885, the Surrogate made an order directing the Union Trust company to pay to Wellesley W. Gage the sum of \$10,900, out of the funds of the estate on deposit in such company. Such payment was subsequently made. On April 28th, 1887, the order aforesaid was vacated and set aside by an order which contained the provisions following: 1st. That Anna K. Gilman, on whose behalf the payment to Gage had been directed to be made, should, within twenty days after service of a copy of said April order, repay said sum to the Union Trust company, or should, within such time, deliver certain papers specified in said order to said Wellesley W. Gage, and pay to the Union Trust company the sum of \$425; and 2d. That, in the event of the delivery of said papers to Mr. Gage, he should, within twenty days, thereafter, pay to the Union Trust company the sum of \$10,475.

A motion is made that Mr. Gage and Miss Gilman be punished as for contempt of court, in disobeying the April order. The affidavits of the moving party allege personal service of a copy of that order upon Mr. Gage, and upon Miss Gilman's attorney, and show that the payment to the Trust company directed by such order has not been made.

It is provided, by § 2554 of the Code of Civil Pro-

cedure, that a decree ordering the payment of money, may be enforced by an execution against the property of the party directed to make the payment. Section 2555 provides that, after the return of the execution unsatisfied, payment may be enforced by service of a certified copy of the decree, upon the party against whom it is rendered, and by punishment for contempt on refusal or wilful neglect to obey. As it does not appear that any execution has been issued in the present case, the sections above cited do not warrant the action now invoked.

Section 2268 of the Code provides, that "where a contempt of court consists in a neglect or refusal to obey an order of the court requiring the payment of a specified sum of money, and the court is satisfied by affidavit that *a personal demand thereof has been made* and that payment thereof has been refused or neglected, it may issue, without notice, a warrant to commit the offender to prison." It is clear that this personal demand must be a demand by or on behalf of the party to whom the order requires the payment to be made. Now it does not appear that the Union Trust company has ever made, or caused to be made, a personal demand for the payment of the sums heretofore directed to be restored to its custody.

I find no other statutory provisions that seem to bear upon the present situation, except § 2269, which contemplates as the foundation of the contempt proceedings there referred to, the procurement of an order to show cause. No such order has been granted in the case at bar.

Proceeding dismissed.

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MATTER OF PAINE.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1887.

MATTER OF PAINE.

*In the matter of the application for probate of a paper propounded as the will of JAMES H. PAINE, deceased.*

The nature of the issues to be determined in a Surrogate's court, upon an application for probate of a lost or destroyed will—declared.

PETITION, under Code Civ. Pro., § 1865, for probate of a will of decedent, alleged to have been lost or destroyed.

CHAS. J. BABBITT, *for proponents.*

THEO. H. SWIFT, *for contestants.*

THE SURROGATE.—The petitioner herein seeks the probate of an instrument which is claimed to have been executed by this decedent as his last will and testament. No instrument answering to that description has been produced before the Surrogate, and the evidence shows that no such instrument has been seen since decedent's death.

The Surrogate's authority under these circumstances, to admit a will to probate, rests upon the provisions of § 2621 of the Code of Civil Procedure, and, according to the limitations of that section, can only be exercised where a judgment establishing the will could be rendered by the Supreme Court. Section 1865 of the Code forbids the entry of a judgment

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MATTER OF PAINE.

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establishing a lost or destroyed will, "unless the will was in existence at the time of the testator's death, or was fraudulently destroyed in his lifetime, and its provisions are clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness." The several issues to be here determined are, therefore :

1. Did this decedent, on August 15th, 1885, execute, in compliance with the requirements of law, a written instrument as and for his last will and testament?

2. If he did so execute such instrument, did he, at the time of such execution, possess the testamentary capacity requisite for making a valid will?

3. If he did so execute such instrument, was he induced so to do by undue influence or fraud?

4. If such instrument was so executed, have its provisions been clearly and distinctly proved, as required by section 1865 of the Code of Civil Procedure?

5. If such instrument was so executed, was it in existence at the time of this decedent's death?

6. If such instrument so executed was not in existence at the time of this decedent's death, had it been fraudulently destroyed in his lifetime?

The issues above specified have been the subject of a long and interesting controversy before the Surrogate. They have involved the consideration of a large mass of testimony, and of important and difficult legal questions. When the cause was submitted for determination, it was my purpose, to accompany my formal decision of this controversy with a full statement of the reasons by which such decision should

## MATTER OF PAINE.

be supported. In giving such attention as has been necessary to the volume of business which has been crowded into the last month of my official term, I have been deprived of the opportunity of explaining the grounds upon which rest the following findings: I find as matters of fact:

1. That James H. Paine, died at the city of New York on December 23, 1885.

2. That on August 15, 1885, he executed, in full compliance with the requirements of law, a paper purporting to be his last will and testament.

3. That the provisions of the paper so executed have been clearly and distinctly proved to be, in substance and effect, in the words following:

"I James H Paine of the city of New York, and State of New York, being of sound mind and memory, and of the age of sixty years and upwards, do make, publish and declare this to be my last will and testament, as follows: After the payment of my funeral expenses, and after payment of all my just debts and liabilities, I give, devise and bequeath all the rest and residue of my estate, of any and every kind whatsoever, to my friend John H. Wardwell of the city of New York, to his use and the use of his heirs, forever; and I hereby appoint John H. Wardwell and Joseph Wardwell, both of the city of New York, executors of this my last will and testament."

4. That the paper, so executed by this decedent as his last will and testament was not in existence at the time of his death.

5. That the paper, so executed, was not fraudulently destroyed in the decedent's lifetime.

## WELTE V. BOSCH.

6. That the making and the executing of the paper so executed as aforesaid, were not induced by the fraud or undue influence of any person or persons whosoever.

7. That this decedent, at the time of the execution of the paper so executed did not possess the testamentary capacity requisite for making a valid and effectual will.

I find, as a conclusion of law, that the instrument, so executed as aforesaid, is not entitled to probate, and that the petition for its probate must, therefore, be denied.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1887.

## WELTE v. BOSCH.

*In the matter of the estate of JOSEPH WELLENBERGER, deceased.*

Decedent, during his lifetime, was a partner in business of one A., who died, leaving a will whereof decedent was appointed executor. Upon the death of the latter, B. was appointed administrator with the will of A., annexed, and C., decedent's widow, was appointed administrator of his estate, and instituted a special proceeding to procure a judicial settlement of her account, making B. a party. Thereafter B. commenced an action in the Supreme Court against C., in her representative capacity, for an accounting with respect to the partnership property, and the property of A., in her possession.—*Held,*

1. That B. was a proper and necessary party to the special proceeding in the Surrogate's court.



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WELTE V. BOSCH.

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2. That the attitude of B., in that court, was that of a creditor, urging his claim along with the other creditors of decedent's estate; and that neither at the instance of B. or C., nor by consent of both, could the court adjust the differences between those parties; although, if B.'s claim were admitted, the court had power to direct its payment.

Becker v. Lawton, 4 *Dem.*, 841—explained.

Dakin v. Demming, 6 *Paige*, 95—criticised.

HEARING of objections interposed by a creditor, to account of administratrix of decedent's estate, in proceedings filed for judicial settlement. The facts are stated in the opinion.

S. SULTAN, *for administratrix.*

E. G. BLACK, *for objector.*

THE SURROGATE.—This is a proceeding whereby Maria A. Bosch, as administratrix of the estate of Joseph Wellenberger, deceased, seeks to obtain the judicial settlement of her account.

Wellenberger was engaged in business in partnership with one Joseph Ganter. Ganter died in decedent's lifetime, and while such partnership existed, leaving a will whereof the decedent was appointed executor. The decedent applied for and received testamentary letters, and, after his death, one Emil Welte was appointed administrator, *c. t. a.*, of Ganter's estate. Mr. Welte, as such administrator, *c. t. a.*, has been cited by the petitioner herein to attend her accounting, because of the fact that he has claimed to be interested in this estate as the representative of decedent's deceased partner. Mr. Welte has appeared for the purpose of protesting against his being treated as a party to this proceeding, to be bound, as such, by any

decree in which it shall terminate. In an affidavit submitted in his behalf, he alleges the pendency of an action in the Supreme Court, "for an accounting by her" (this petitioner) "of the goods, property and effects which were of the late firm of Wellenberger & Ganter, and of the property in her possession belonging to the estate of said Ganter;" and he denies the jurisdiction of the Surrogate's court to settle the account, for whose settlement he has brought the Supreme Court action above referred to.

The administratrix now moves that Mr. Welte's objection be overruled. It is alleged on her part and is not denied by her adversary, that the Supreme Court action was commenced since the initiation of this proceeding. But this circumstance is, in the view I take of the situation, immaterial. It was certainly very proper for the administratrix to make Mr. Welte a party to the present proceeding; indeed she could not prudently have neglected to take that course (*Dakin v. Demming*, 6 *Paige*, 95; *Montrose v. Wheeler*, 4 *Lans.*, 102; *Bunnell v. Ranney*, 2 *Dem.*, 329; *Estate of Coman*, *Surr. Dec.*, 209). Her procedure has been regular, even though it should appear that the Surrogate's court is not a competent tribunal to determine the respective rights of the parties. In that event, the sustaining of Mr. Welte's objection simply necessitates the withdrawal from the Surrogate's consideration, of the questions and issues which the objector insists should not here be passed upon. The accounting may, in all other respects, proceed, or, if the circumstances of the case shall seem to warrant, it may be suspended, until there is a disposition in

another tribunal of the particular matter involved in this decision.

I am of the opinion that Mr. Welte's objection to the jurisdiction of the Surrogate must be held to be well taken, unless the accounting party herein is willing to concede an indebtedness on the part of her decedent to the estate of his decedent's deceased partner, and to concede, as the amount of such indebtedness, the amount which the representative of the latter is willing to agree to and accept. The attitude in which Ganter's representative here stands is that of one urging a claim as creditor, in common with other creditors of the estate. If this claim is admitted, it is competent for the court to direct its payment; if it is disputed, and is not adjusted by agreement of the parties, resort must be had to some other tribunal for its settlement (*Bunnell v. Ranney, supra*; *Est. of Coman, supra*; *Montrose v. Wheeler, supra*; *Green v. Day, 1 Dem., 48*).

The case of *Dakin v. Demming (supra)*, so far as it contains a contrary intimation, is not authoritative. The *dictum* there appearing was based upon a statutory construction which has since been declared erroneous. *Green v. Day (supra)*. Neither *Becker v. Lawton (4 Dem., 341)* and the authorities there cited, nor § 2739 of the Code of Civil Procedure have any reference to a situation such as here exists. The cases referred to recognize the power of this court to determine the validity of a claim made in behalf of a decedent's estate against its representatives, to the same extent that such power existed under the Revised Statutes; by the same section of the Code, the Surro-

gate is also given authority to pass upon a demand against the estate in favor of its representatives. The principle underlying the decisions of the cases cited is enunciated in the opinion of Chief Judge FOLGER, in *Kyle v. Kyle* (67 *N. F.*, 408). The learned Judge there says: "It has been held that the Surrogate may hear and determine a claim against the executor in favor of the estate" (citing *Gardner v. Gardner*, 7 *Paige*, 112). "It is for the reason that, unless he may do so, those interested in the estate have no remedy save by bill in equity, inasmuch as no suit at law can be brought; for the executor, who is the legal representative of the estate, cannot sue himself. The same reason is applicable here, and is probably the basis of the statute cited" (the statute here referred to is L. 1837, ch. 460, § 37).

I hold that, neither at the instance of this accounting party, nor upon the demand of the objector, nor by the consent of both, can the Surrogate's court, in this proceeding adjust the differences between the parties.

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MATTER OF GROVE.

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NEW YORK COUNTY.—HON. R. S. RANSOM, SURROGATE.—January, 1888.

MATTER OF GROVE.

*In the matter of the estate of MARGARETTA GROVE, deceased.*

The husband of an administratrix of the estate of an intestate is a competent surety upon her official bond.

Matter of McMaster, 12 Civ. Pro. R., 177—disapproved.

JUSTIFICATION of surety on official bond of administratrix of decedent's estate. The facts are stated in the opinion.

THE SURROGATE.—The administratrix, after taking the oath of office and signing the required bond in the penalty of \$6,000, produced, as one of her proposed sureties, her husband. The administration clerk refused to accept him as a surety, the custom having been latterly to conform the practice, in this particular, to the decision by LAWRENCE, J., in the Matter of McMaster (12 Civ. Pro. R., 177). Up to the present time this decision has never been questioned; no objection has ever been made to the rejection of a husband or wife as the surety on the bond of each other.

The facts in the McMaster case, were as follows: Mary G. Muir, as executrix of David McMaster, gave three undertakings, upon each of which her husband,

David Muir, was a surety. The respondent, Johanna Bernhard, excepted to his sufficiency as a surety, on the ground that he had not the legal capacity to be the surety of his wife.

Judge LAWRENCE, in his opinion says: "The cases cited by Mr. Foster, respondent's attorney, seem to sustain the exceptions taken by him to the sufficiency of Mr. Muir as surety for his wife." The above is all there is of the opinion: no cases are cited, and the justice relies entirely on the cases cited by respondent's attorney for reaching the above decision.

The first case presented by counsel in that case was *Bertles v. Nunan* (92 *N. F.*, 152), which bears simply and solely on the point of what estate husband and wife are seized of, where there is a joint conveyance of land to them, and decides that they do not take as tenants in common, or joint tenants, but as tenants by the entirety, and for this purpose the common law doctrine of the unity of husband and wife has not been abrogated by statute, and recognizes the fact that, under the statutes of 1860 and 1862, the wife is enabled to control and convey whatever estate she gets by any conveyance made to her solely. The next case cited was *Zornlein v. Bram* (100 *N. F.*, 12). This case was decided precisely on the same point as the one in 92 *N. F.*, and the same remarks and criticisms will apply.

The next case which was considered by Judge LAWRENCE was *Fairlee v. Bloomingdale* (14 *Abb. N. C.*, 341). This was on the point of the validity of a partnership existing between husband and wife, and the court held that, prior to 1884, such a partnership could not exist, because in a partnership there can be

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MATTER OF GROVE.

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no "separate property" and "business," and the "labor" performed by one partner in connection therewith, cannot possibly be on the "sole and separate" account of the party performing it. This case is negative rather than affirmative authority that, where the wife has a separate estate, she is absolute mistress of it, as though she were a feme sole, but that, because the very nature of a partnership requires a joint ownership of the partnership property, she is thus placed in the position of any partner in respect to the joint ownership of the partnership property; and then the common law rule applies that, because of the unity of husband and wife, there can be no partnership between them. The other cases cited are on this last point.

It will be seen that Judge LAWRENCE has evidently not examined the Laws of 1884, chap. 381. All the cases cited above were considered before that act, as indeed were the cases that will be considered later on; but that act weakens and lessens whatever effect the above mentioned cases may have on the point, while it strengthens those cited in support of my theory.

There is no doubt but what, at common law, the contracts of a married woman are void, and cannot be enforced against them; but in equity, a married woman having a separate estate, has been treated as to such estate, as a feme sole, and capable of charging such estate in equity with all her debts and obligations. This is so universally conceded and settled that authorities are unnecessary. Now that we have her right to make a contract charging her separate estate, we will go a step further. Can

she make a contract whereby she agrees to become surety for her husband on his promissory note or other obligations if she expressly charges her separate estate? The entire weight of the authorities support this proposition.

The most notorious case on this point seems to be that of *Yale v. Dederer* (18 *N. Y.*, 265). In that case, Dederer had bought 38 cows of plaintiff, and refused to complete the sale unless his wife would write him a note for the price. An action was brought against Dederer, judgment recovered and execution issued and returned unsatisfied, and an action then brought against the wife. She was proved to have a separate property amply sufficient for the payment of the note. Judgment against her was awarded at Special Term, affirmed at General Term and reversed by Court of Appeals. In the opinion, COMSTOCK, J., says: "My conclusion, therefore, is that, although the legal disability to contract remains as at common law, a married woman may, as incidental to the perfect right of property and power of disposition which she takes under this statute, charge her estate for the purposes and to the extent which the rule in equity has heretofore sanctioned in reference to separate estates." The judgment was reversed upon the ground that the mere signing of a note by a married woman—not, in fact, for the benefit of her separate estate, but as surety for another, and not declared in the note to be for her benefit, and where she had not professed in her contract to charge such estate—did not operate as a charge upon the estate.

A much stronger case is that of the *Corn Ex. Ins.*



## MATTER OF GROVE.

Co. v. Babcock (42 *N. Y.*, 613), where it was held that, where a married woman, having separate real estate, indorses her husband's promissory note as his surety without consideration and without benefit to her separate estate, but which indorsement expresses that, for value received, she thereby "charged her individual property with the payment of this note, an action on such indorsement, in which is alleged the coverture of the defendant, the ownership by her of separate estate, her intent to charge such estate with the note, and her indorsement in the form stated, is maintainable." This case was followed in 50 *N. Y.*, 660.

In the Third Nat. Bk. v. Blake (73 *N. Y.*, 260), the defendant, Elizabeth M. Blake, indorsed the promissory note of her husband to the plaintiff, thus: "I hereby charge my separate and personal estate for the payment of the within note: *held*, that this was a valid agreement on her part, based on a sufficient consideration, and was binding; that the indorsement being in form a charge upon her separate estate, she could deal with the obligation as if she was a feme sole."

These cases would seem to settle beyond any doubt that a married woman, having a separate estate, can become the surety of her husband on a promissory note. I have been unable to discover any decisions where the husband or wife have gone on each other's bond; but the two cases become so similar—the same principles of law governing both—I think the cases above referred to must govern in the latter as in the former case.

It is true that the question under discussion is whether the husband can go on the wife's bond; but having established that, under similar circumstances, the wife could become surety for her husband, I have no hesitation in saying that the husband could for the wife, and, indeed, I think that would be the stronger case of the two.

All the cases discussed above were decided prior to 1884. In that year chap. 381, Laws 1884, was passed by the legislature, and reads as follows:

"Section 1. A married woman may contract to the same extent, with like effect and in the same form, as if unmarried, and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate, or otherwise, and in no case shall a charge upon her separate estate be necessary.

"Section 2. This act shall not affect nor apply to any contract that shall be made between husband and wife."

This enactment removes even the requirement that in a contract she may make either with third persons for her own benefit or the benefit of her husband, she need not expressly charge her separate estate, and as the counsel for the administratrix has argued in his brief, the contract is not with him, but about him, and made with a third party as obligee.

A husband and wife may form a partnership and give notes in the firm name where the debt was created for property furnished for the benefit of her separate estate (*Graff v. Kinney*, 37 *Hun*, 405).

Suppose we admit, for the sake of argument, that if

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MATTER OF WHITE.

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a wife go on her husband's bond, or vice versa, that it is a contract between them and not one with a third person; even in that case it has been held that she may contract with her husband in relation to her separate estate (*Bodine v. Killeen*, 53 *N. Y.*, 93; *Knapp v. Smith*, 27 *N. Y.*, 277).

But there can be no question as to who would be the contracting parties in the case of a bond. A perusal of the bond will show that the obligor or obligors are held and firmly bound unto "the People of the State of New York." It is very plain that the contract is between the surety and the People.

I think there can be no question but what the husband or wife can go on each other's bond; in the case of the wife, if she has a separate estate; and the decision of Judge LAWRENCE should be disregarded.

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NEW YORK COUNTY.—HON. R. S. RANSOM, SURROGATE.—February, 1888.

MATTER OF WHITE.

*In the matter of the estate of JOHN H. WHITE, deceased.*

Where an executor or administrator, who has paid out money on account of expenses of administration, produces a voucher showing the nature of the disbursement and stating facts which, if true, show the same to have been reasonable, and necessary for the good of the estate, a presumption is raised in favor of the correctness of the charge, which

## MATTER OF WHITE.

must be opposed by affirmative evidence on the part of one contesting the demand for credit.

*Valentine v. Valentine*, 3 *Dem.*, 597—approved.

An executor or administrator has authority, where the circumstances of the estate render such a course reasonable, to employ an agent in the management of its affairs; and such agent may be also the legal adviser of the representative.

*McWhorter v. Benson*, *Hopk. Ch. R.*, 28—followed.

A decree, judicially settling an executor's or administrator's account which includes a bill for expenses of administration, shown to have been only partly paid, protects the accounting party as to that part, only, of the bill so paid, and leaves the question of the propriety of further payments on account thereof open for future settlement.

HEARING of exceptions taken by executrix to report of referee, to whom were referred her account, and creditors' objections thereto, filed in proceedings for judicial settlement.

ELIAL F. HALL, *for executrix.*

PAYSON MERRILL, *of counsel:*

The final account of Lucy E. White, sole executrix of decedent's will was filed May 5th, 1886. The exceptions of the executrix cover the sum of \$863.44, which was the amount disallowed by the referee from the sums paid by the executrix to Hall & McMahon and to Elial F. Hall individually, for services as attorney, counsel and agent.

Decedent died February 26th, 1877. His will was proved March 21st, 1877. He gave everything to his wife and made her sole executrix. She engaged Elial F. Hall as her attorney on May 11th. On June 26th, 1877, she gave up her residence in New York city, and returned to her former home in Jamestown,

## MATTER OF WHITE.

N. Y., where she has since resided, though occasionally coming to the city.

The executrix filed her first account on August 19th, 1879, which went to a decree November 13th, 1879, without objections. The last item in Schedule C of this old account, and numbered as Voucher 141, was as follows: "Amount of payments made to Hall & McMahon on account for professional services rendered from May 11, 1877, to this date, \$2,096.03." Then came the signature of the executrix to the schedule, and immediately below this on the same page was the following memorandum or notice: "The above payments of \$2,096.03 to Hall & McMahon were made on account of their bill of \$3,137.74, which bill is filed with this account." See Voucher 141. The balance left unpaid of this bill was \$1,041.71. It was all paid as early as June, 1880. It stands as an item of credit under Voucher 137 of Schedule C of the present account. In June, 1886, six years after its payment, objection to it was filed by E. L. Bushe, Esq. (law partner of the testator), as attorney for the same creditors for whom he had appeared on the accounting in 1879, as appears by the decree. The trial of this objection to the payment of the balance of \$1,041.71, involved a trial of the entire bill of \$3,137.74, which is divided into 63 items as numbered. Sixteen of these have been carefully picked out and adjudged to be vulnerable, and cut down to the extent of \$538.22, which is the sum deducted by the referee from the balance of \$1,041.71. Sixteen of the 20 exceptions filed by the executrix relate to these 16 rulings. The referee held that the

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decree of November 13, 1878, was a protection to the executrix only in respect to the \$2,096.03 actually paid on account of the bill of Hall & McMahon, and that the provision of the Revised Statutes (Part 2, ch. 6, tit. 3, art. 3) making the final settlement of an account conclusive evidence, could not be applied to the bill itself or the balance unpaid. We submit that the referee erred in so deciding. But further than this, he treated the bill as if it were a matter of yesterday, and allowed no presumptions in favor of the executrix or her attorneys to be drawn from the following facts: (1) That the bill was filed as a voucher with the account in 1879, (2) that attention was especially called to it by the executrix in that account, (3) that no objection was then made to it by anybody, (4) that it was paid as a matter of course in honest reliance upon the fact as supposed that Mr. Bushe and his clients were satisfied with it, as was probably the fact at that time, (5) that six or seven years had passed without any hint from them of dissatisfaction, and (6) that there is no allegation or pretence that any item of this bill wears any badge of fraud or contains any element of "gross injustice," like the charge of \$5,000, in *St. John v. McKee* (2 *Dem.*, 236), cited by the referee.

The entire amount of assets in cash received and accounted for by the executrix is \$103,213.22.

The amount of the principal aside from interest of the claims of creditors cited on this accounting and entitled to share in its proceeds is \$29,248.18. On these claims the executrix has paid the sum of \$18,893.95, which is over sixty-four and one half per

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cent. of the principal. (There has been no expense for a bookkeeper to keep the accounts with these creditors.)

Most of the estate consisted of real estate, of which there were 17 separate pieces or parcels, three of which were abandoned. The amount of taxes and assessments on the remaining 14 pieces that were confirmed before the decease of the testator, and had to be paid in full by the executrix, was more than \$14,000.

The amount of the bill of Hall & McMahon filed with the account in 1879, and of Hall's three bills filed with the present account is \$6,331.85, from which deduct \$78.66 for disbursements, and you have the sum of \$6,253.19 as the entire amount of the charges for services, to which there may be added the allowance of \$1,000 in the decree on the accounting in 1879.

The amount of cash in the hands of the executrix as stated in the present account and supplement, together with interest earned in the Trust Co., is \$15,972.02, to which the referee adds as disallowed by him from the expense account the sum of \$760.63, making in all the sum of \$16,732.65. From this last sum, or rather, if we are right in our contention, from the sum of \$15,972.02, there is to be deducted the sum of \$1,153.75 for the fees of the referee and stenographer, thus leaving a balance of \$15,578.90, or rather, if we are right in our contention, the sum of \$14,818.27.

In the case of *White v. Kane* (19 *J. & S.*, 295), it was decided that Mrs. White, as devisee after payment

of debts, was a trustee for creditors, and as such had full power to sell and convey the real estate.

*The Burden of Proof.*

The referee states the rule of law which governs him as follows: "It is well settled that an executor is not entitled to reimbursement for sums expended for legal services by simply showing the fact of payment, even though he also shows that he has acted honestly and in good faith. Upon objection being made, he must show the necessity and value of such services." Our answer to this is that this rule applies only where there are no vouchers or the vouchers are insufficient, or where they are such (as was the fact in the cases cited by the referee) that there is some grave suspicion about them. But here no question was raised as to the sufficiency of the vouchers. Consequently the burden of proof was on the objectors.

The rule as it stood in the first edition of the Revised Statutes, and as it has stood ever since without alteration or amendment is as follows: "And in all cases such allowance shall be made for their actual and necessary expenses as shall appear just and reasonable." Executors and trustees, when they file their accounts, must file vouchers for their expenses. These must be such that it will "*appear*" upon the face of them, that the expenses were necessary, just and reasonable. If they satisfy this requirement, then the burden of proof is upon the objectors. Counsel fees stand upon the same footing as other expenses. If the vouchers are insufficient in the par-



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ticulars mentioned, then and only then the burden is upon the executor to adduce evidence to make up for what is lacking in the voucher. The *onus probandi* is always on the party having the liberty to surcharge and falsify (Smith's Manual of Equity, 245; Hoffman's Master in Chancery, 81; Metzger v. Metzger, 1 *Bradf.*, 265; Boughton v. Flint, 74 *N. Y.*, 485; Fowler v. Lockwood, 3 *Redf.*, 465; Valentine v. Valentine, 3 *Dem.*, 602).

In the first two of the three cases cited by the referee from 2 *Demarest*, the charges for counsel fees, in the language of Surrogate Calvin (4 *Redf.*, 6) "appeared to be exorbitant." In fact, they were so excessive that it might well be said of the vouchers that they were fraudulent on their face, and they were evidently so regarded by Surrogate Rollins. In *St. John v. McKee* (2 *Dem.*, 216), the voucher for \$5,000 "describes in very broad and sweeping terms the services for which the charge is made, and its lack of particularity has not been supplied by the testimony before the referee. Neither the executor nor his counsel, both of whom were examined at the reference, seemed to have any accurate notion of the nature and extent of such services." In *Journault v. Ferris* (2 *Dem.*, 320), there were three items, aggregating \$7,800, for counsel fees. One of these, for \$2,500, as described by the Surrogate on page 325, covered among other things, services in receiving funds, examining mortgages and their value, taking care of them, collecting interest, keeping the accounts, etc. It does not appear that there was any proceeding in court of any kind. Under these circumstances,

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the referee obviously erred in casting the burden of proof upon the objectors. The third case cited by the referee is *Wilson v. Wilson* (2 *Dem.*, 462). In this, the facts are so meagrely stated that it is impossible to see its bearing in this connection.

The rule as quoted from the referee's opinion, is taken by him from the opinion of the Surrogate in *St. John v. McKee* (2 *Dem.*, 236). The referee ignores the fact in this case, as also in *Journault v. Ferris* (2 *Dem.*, 320), of the suspicious and fraudulent character of the vouchers. He takes the law of cases where the vouchers were bad, and applies it to a case where they are confessedly good. This, we submit, is a fatal error. But it is sufficient to account for all the rulings excepted to by the executrix. According to the view of the referee, the executrix stood before him as if she were plaintiff in an action at law for money paid, laid out and expended. An objection to any of the items of payments for services raised an issue of fact, the same as a general denial, and the burden of proof was on the executrix to "show the necessity and value of such services," and the benefit of any and every doubt was to be given to the objectors. Thus as to each item objected to, the referee sat as a jury upon the trial of a *quantum meruit*, and gave his independent verdict *de novo*, as to value, without any consideration for the fact that he was dealing with the accounts of an executrix and trustee, and whose vouchers were all right. "It is thought to be well settled that a trustee, while acting under a general trust, is entitled to be allowed for all disbursements for taxes, repairs, salaries, insurances, and for

all other charges and expenses which he in good faith thinks proper to pay" (Young v. Brush, 28 *N. Y.*, 672). As to the items in the bill of Hall & McMahon, some allowance ought to have been made for the length of time that had elapsed and the difficulty of going into the details of business, that had been wound up and disposed of for eight or nine years and long since forgotten. In Young v. Brush (*supra*), great consideration was given, to the advantage of the executor, to what Judge DAVIES spoke of as "this great lapse of time."

We have not overlooked the statement in 2 *Dem.*, 238, and again in 4 *Dem.*, 334, that the authority of the Surrogate to sanction credits for sums expended for counsel fees is derived from L. 1863, ch., 362. This statement we beg leave to say, is disproved by the facts of history. The statute of 1863 made no change in the law on the point now before us. It altered the rates of commissions and then repeated *verbatim et literatim* the original provision of the Revised Statutes as we have quoted it. And this provision itself was only a codification of the rule of practice long observed in ecclesiastical and equity, and also in Surrogates' courts.

We have also observed the distinction sought to be made between credits for expenses and those for payments of debts. See 2 *Dem.*, 324-325. This distinction is *obiter*. It is founded upon the change just mentioned, made, as supposed, by the statute of 1863, and it falls to the ground upon the discovery of the fact that that statute made no such change.

*Charges disallowed on the ground that the services should have been performed by the executrix.*

The leading case on this subject is *McWhorter v. Benson* (*Hopk. Ch. R.*, 28), of which the head note is as follows: "An executor is entitled in the settlement of his accounts to be allowed the reasonable charges paid by him to an agent employed in the management of the estate of which he is executor, if the circumstances of the estate rendered the employment of such agent proper and justifiable."

The testator in this case was John Lawrence, of New York city, and the defendant Egbert Benson was the sole acting executor. The agent in the case was a lawyer named Boyd. His bill was paid by Benson and allowed by the Master, and afterwards by the Chancellor. The reporter makes no accurate statement of the charge made by Boyd; but it appears from Schedule G, annexed to the Master's Report on file in the county clerk's office, that the charge consisted of only a single item, in words and figures as follows:

"1815, April 1. To amount of compensation for services as general agent of the executors from October 1st, 1813, to April 1, 1815, in conducting the affairs of the estate generally, and for selling different parcels of the real estate situate in the city of New York, being a commission of 2½ per cent. on the monies received, and 2½ per cent. on the monies paid by him, \$2,318.34.

The Chancellor, on page 34 of *McWhorter v. Benson*, speaks of the Lawrence estate as "this great

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estate." But it was no greater than this White estate. From the schedules annexed to the Master's Report, it appears that the personal estate amounted to \$22,291.64. The sum realized from the inventoried assets in the first account filed in the White estate was \$26,876. The amount received and paid by Boyd, and upon which he was allowed 5 per cent. commission, must have been about \$43,367. This is less than one half of the amount received and paid by the agent in this White estate, and much less than the amount collected by him on sales of real estate in this city.

We come next to the cases of *Vanderheyden v. Vanderheyden* (2 *Paige*, 287), and *Cairns v. Chaubert* (9 *Paige*, 160). In this last case the Chancellor says that the Surrogate was right in allowing the executrix the \$500 paid to Clark for his services in settling the estate. The case arose out of the estate of George Rapelje, of this city. But the report in *Paige* gives no information as to the nature of the services for which the widow and executrix paid the \$500. We have found in the records of the Surrogate's office the manuscript opinion of Surrogate CAMPBELL in this case (*filed in 1844, Bundle 20*), and the fact that it has never been reported or printed is our excuse for producing here the following extract :

"The third item in controversy for which the executrix claims credit is the sum of \$1,000 paid to Gerardus Clark, Esq., for acting as the *Agent and Counsel* of the executrix. This item is objected to on the ground that the executrix is allowed a commission for her services, and that if she employs an agent to

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do the duty imposed on her by law, she must pay him out of such commission, and not subject the estate to the double charge. It appears by the testimony of G. Clark in the case, that of the sum of \$1,000 which he received, he considered that \$500 only were for services rendered the personal estate of Mr. Rapelje, and that that sum only should be charged against it. It has frequently been decided that executors and administrators may employ agents when the circumstances of the case render it proper, and that all reasonable disbursements to an agent employed in good faith, for purposes beneficial and important to the estate, must be allowed (*Hopkins*, 42; 2 *Paige*, 287.)

"The present case, I think, comes fully under the above rule. Here was a large personal estate, and debts to a large amount existing against it: all of which were in great confusion, as the testator had left no books of account or instructions to guide his executrix, and to increase the difficulties, part of the property lay in Westchester county and part in the city of New York. Under all these difficulties I consider that the executrix, in order to protect the estate from imposition, was justified in employing an agent to assist her in investigating all these intricate and difficult matters. The sum of \$500 charged by Mr. Clark being inconsiderable when compared with the amount of the personal estate, I am of opinion that the item is not too large, and should be allowed the executrix as a proper disbursement."

In *O'Gara v. Clearkin* (58 *N. Y.*, 663), the head note is as follows: "An executor or administrator may employ an agent if the peculiar circumstances of the

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estate require it, and may be allowed all proper expenses for its care and management; but the compensation of the agent must be measured by the nature, extent and value of the services."

The rule is stated in 3 W'ms on Ex'rs, 1971, as follows: "An executor is justified in having recourse to an agent to collect the assets in cases where a provident owner might well employ a collector, and the executor will therefore be allowed the expense so incurred in his accounts."

Again, a devise as here, charged with the payment of debts, is a devise in trust to pay the debts. This was decided in *White v. Kane* (19 J. & S., 295). The attitude of Mrs. White therefore is like that of an assignee for the benefit of creditors, "with the customary authority to employ other persons to act for him when circumstances may render it necessary, and when for good and sufficient reasons he is unable to give the business his personal supervision and attention" (*Casey v. Janes*, 37 N. F., 612).

Again, the Chancellor, on page 34 of *McWhorter v. Benson*, speaks of the "incumbered and perplexed situation" of the Lawrence estate as the reason that rendered it fit and necessary to employ an agent. It requires no argument to show that this reasoning applies *a fortiori* to an insolvent estate.

One of the evils to be guarded against in the settlement of estates is the evil of saddling good assets with the expenses of collecting bad ones. This evil will be avoided if you put the bad assets one side, and make them stand on their own footing, and keep a separate and distinct account of them. This is just what has

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been done here, with a result, however, to the estate that is inconsiderable. But there is no reason in this circumstance or in any other, why the attorney should not receive such a reward from the fruits of his industry as his services are "inherently worth."

E. L. BUSHE, *for W. N. Harvey, guardian, and others creditors.*

W. A. W. STEWART, *for U. S. Trust Co., creditor.*

J. WHITE, and WEHLE & JORDAN, *for creditors.*

THE SURROGATE.—The rule is well settled that, where a payment is made by the executor for expense of administration and a voucher for the same is produced, showing upon its face the nature and character of the expenditure and a reasonable statement of the facts rendering the same just and reasonable, a *prima facie* case for the executor is made out and the burden of impeaching such expenditure is on the objector. If the charge be reasonable on its face and said to be necessarily contracted for the good and benefit of the estate, the presumption is that it is correct and the burden is on the objectors (Matter of Frazer, 92 *N. Y.*, 247; Hoffm. Mast. Ch., 81; Metzger v. Metzger, 1 *Bradf.*, 267; Fowler v. Lockwood, 3 *Redf.*, 468; Valentine v. Valentine, 3 *Dem.*, 597.)

These cases establish the justness and reasonableness of all the executor's charges and sustain all the exceptions to the referee's report, unless the objectors have impeached them by testimony sustaining their objections. It is, therefore, important to look at the testimony to ascertain whether the objectors have overcome the *prima facie* case of the executrix. No



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witnesses were called by the objectors to impeach any of the charges of the executrix, but they relied on certain adjudicated cases which seemed to them to cast the burden of showing the propriety of the charges upon her, notwithstanding the fact that by vouchers she had shown, within the doctrine of these same cases, as it seems to me, that the charges were just and reasonable and must be allowed, unless overthrown by direct evidence. I cannot agree with the learned referee or counsel in this regard. A careful examination of the account of the executrix and the vouchers satisfies me that her expenses were just and reasonable and should be allowed.

Specially remarking the suggestions of the learned referee to the effect that certain items disallowed by him were for services which the executrix should have rendered herself, he is in error, I think, under well settled rules of decision on this point, which are summed up in *McWhorter v. Benson* (*Hopk. Ch. R.*, 28): "An executor is entitled in the settlement of his accounts to be allowed the reasonable charges paid by him to an agent employed in the management of the estate of which he is executor, if the circumstances of the estate rendered the employment of such agent proper and justifiable." The executrix, considering the circumstances of the estate, had a right to employ Mr. Hall and his firm as agents as well as attorneys, and his and its services were necessary and proper, and compensation therefor is a righteous charge against the estate. As I have already said, there is no allegation here that the amount charged is excessive for the services; and from an inspection of the ac-

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count and vouchers the amounts charged are reasonable and should be allowed.

Without taking up each item of the account disallowed by the referee and discussing it in the light of his opinion, it is enough to say in disposing of them all, that no testimony was given by the objectors; and whilst the learned referee had a right to exercise his own judgment, he could not do so uninfluenced by the uncontradicted evidence given by the executor, which clearly established the propriety of the charges. I, therefore, hold that the learned referee erred in making the reductions and disallowances. It is an undoubted fact that the tendency of all persons managing estates is toward extravagance and it is the duty of the Surrogate and his referees to carefully guard against this disposition; and in this case, no doubt, the learned referee was greatly influenced by this fact and the further fact, which seems admitted here, that this estate is insolvent. Fully appreciating the force of this reason, I am satisfied that these charges were fairly made and that the affairs of the estate were wisely and economically administered.

This brings me to the last question, viz.: as to the soundness of the referee's ruling that the decree of November 13th, 1879, only protected the executrix in respect of the \$2,096.03, actually paid on account of the bill of Hall & McMahon. Considering my views on the merits of the items which make up the balance unpaid on that bill presented in 1879, it is not important that I should spend any time on this subject. It is enough to say that I entirely agree with the referee (*Leviness v. Cassebeer*, 3 *Redf.*, 491; *Re Withers*, 2

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*Civ. Pro.*, 162; Re Stokes, 3 *id.*, 384; Tucker v. Tucker, 4 *Keyes*, 136).

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NEW YORK COUNTY.—HON. R. S. RANSOM, SURROGATE.—February, 1888.

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*In the matter of the estate of BENJAMIN PETTIT, deceased.*

Testator's will, after bequeathing legacies amounting to \$4,000, gave, devised and bequeathed "all the rest, residue and remainder of my (his) property and estate, both real and personal," unto certain persons named, their heirs and assigns forever. His personal property, at the time of the execution, was known to testator to be worth only about \$1,000. There was no specific devise of realty.—

*Held*, that the legacies were charged on the realty.

*Lupton v. Lupton*, 2 *Johns. Ch.*, 614—compared.

CONSTRUCTION of will, on judicial settlement of executors' account.

THE SURROGATE.—The deceased died leaving a last will and testament which provides, among other things, that "I hereby give and bequeath unto my granddaughter, Margaret E. Drake, the sum of one thousand dollars, to have and to hold for her own benefit and behoof forever." And in another clause,

"I give and bequeath unto my grandson, Eugene Hendrickson, the sum of five hundred dollars, for his

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own benefit and behoof forever." And in another clause,

"I give and bequeath unto my grandchildren, George Pettit, David Pettit, Marion L. Hendrickson, Charles Hendrickson and Susan Hendrickson, the sum of five hundred dollars each, to be paid to them respectively as they severally attain the age of twenty-one years." And by the fifth clause,

"All the rest, residue and remainder of my property and estate, both real and personal, and of every character and description and wheresoever situate, I give, devise and bequeath unto my children, Emeline, wife of Henry Standish; Sarah E. Sharrot, wife of John E. Sharrot; and David Thomas Pettit, to have and to hold same unto my said three children, their heirs and assigns forever, equally, share and share alike."

David T. Pettit and John D. Sharrot are appointed executors. They are directed, during the minority of the five grandchildren, to pay them half-yearly the interest of the five hundred dollars bequeathed to each of them. All the legatees and next of kin were cited.

The question to determine is, whether these legacies are or are not a charge upon the real estate devised by testator to his three children.

D. T. Pettit, one of the executors, makes an affidavit to the effect that at the date of the execution of the will the personal property available to pay legacies amounted to between one thousand and eleven hundred dollars, and that at this date, personal property of deceased, available to pay legacies, does not exceed three thousand dollars.

The construction of the will is put in issue by Margaret E. Drake, a legatee, under Code Civ. Pro., § 2624.

The leading case on the subject as to the charging of the realty of a testator with the payment of legacies where the personalty is inadequate, is *Lupton v. Lupton* (2 *Johns. Ch.*, 614). There the testator bequeathed to his three grandchildren, as soon as they should attain the age of twenty-one years, the sum of five hundred pounds, and the further sum of five hundred pounds when they should attain the age of twenty-five years, and after devising certain lands to his said three grandchildren, etc., he bequeathed "all the rest, residue and remainder of my real and personal estate not hereinbefore already devised and bequeathed, their heirs and assigns forever" (his three children).

The controversy arose as to the construction of the will; whether or not these legacies were a charge upon the real estate. Held, that they were not; that "the clause which gives the residuary estate to the defendants does not afford evidence of an intention to charge the land with these legacies, and that it can never be charged unless the testator intended it should be, and that intention must either be expressly declared or fairly and satisfactorily inferred from the language and disposition of the will. If the residuary clause created such a charge, the charge would have existed in almost every case, for it is the usual clause and a kind of formula in wills. It only means when taken distributively that the rest of the personal estate, not before bequeathed, is given to the residuary legatees, and that the remainder of the real estate not before devised is in like manner disposed of."

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This case has never been overruled, but has been commented upon, distinguished, and cited a great number of times. The rule there laid down has been sometimes construed strictly and oftentimes liberally. The exigencies, extrinsic facts and surrounding circumstances of each case, seem to have governed the greater number of adjudications on this point.

It will be observed that the Lupton case is somewhat similar to the case at bar in this respect: that the relationship between the testator, the general legatees and the residuary legatees is the same in both cases, and that the time fixed for the payment of the legacies is the same, viz.: when the grandchildren attain the age of twenty-one years. But it will also be noticed that in the Lupton case there was a specific devise of real estate to the grandchildren, while in the case at bar there was none. This, I think, is an important fact to be taken into consideration.

In *McCorn v. McCorn* (30 *Hun*, 172), it was held that where it could be seen from the extrinsic facts that it was certain that the testator knew he had no personal property out of which the legacy could be paid, and the will plainly shows the intention that it should be paid, which could only be done by charging it on the realty, that it was a charge upon the real estate.

In *Scott v. Stebbins* (91 *N. Y.*, 605), an equal undivided half of certain real estate and \$5,000, were bequeathed to the testator's son, and to another son the other equal undivided half and \$2,000, and he was also forgiven a certain indebtedness to the testator; so that it was evident that it was the intention

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of the testator to give them equal shares. After bequeathing certain other legacies, all the rest, residue and remainder of the estate, both real and personal, was devised in trust: first, for the support of his father; and second, after the death of the father the trustee was to pay to the Oneida Seminary \$15,000, and the balance to his sons, share and share alike. The question was whether the legacy of \$5,000 to the son could be charged on the real property. It was held that it was such a charge. The court said that as the general legatee was one of the testator's sons, while the residuary legatee was the seminary, that it was not the intention of the testator to give a preference to the seminary over his children, and for the further reason that the residuary estate, both real and personal, constituted a single fund; in other words, that there was a blending of the two estates. The court distinguished it from the Lupton case on the ground of the difference of relationship between the testators and legatees in the two cases.

In *Forster v. Civill* (20 *Hun*, 282) the testator bequeathed nine specific legacies and no specific devise of real estate, the only provision in that regard being that "all the rest, residue and remainder of my estate, real and personal, whatsoever and wheresoever, I give, devise and bequeath," etc. The question was whether the legacies were a charge upon the real estate, the personalty being utterly insufficient. It was held they were a charge on the realty because there was no specific devise of real estate, and consequently the language in the residuary clause evidenced an intention on the part of the testator to charge the

realty. In the case at bar, there is no specific devise of real estate, and the language of the residuary clause is similar to that used in the above case.

In *Manson v. Manson* (8 *Abb. N. C.*, 123), the testator bequeathed \$20,000 to his wife; his personal property only amounting to \$500. Held, that the legacy was a charge on the land. The point which seemed to influence the Justice there was that the personalty was grossly inadequate to satisfy the legacy. *Quære*: Would \$1,000 be grossly inadequate to charge legacies amounting to \$4,000?

In *Bevan v. Cooper* (72 *N. F.*, 317), the testator, after directing the payment of his debts out of his personal property and after certain general bequests to strangers to his blood and a specific devise of certain real estate, the will directs in the residuary clause: "I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal, to the executors of my will in trust . . . . to rent the rest of my real estate and invest the rest of my personal property and keep the same invested in good securities." The personal estate proved insufficient to pay the debts and general legacies. Held, that the general legacies were not chargeable on the residuary real estate for the reason that the inadequacy of the personalty was not revealed until after the testator's death; and for the further reason that there was no evidence in the residuary clause that it was the intention of the testator to blend the two estates; on the contrary, there was an expressed intention to keep the two estates separate; and for the further reason that the legacies sought to be charged were to stran-



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gers to his blood, while the residuary legatees were his widow and children, the court would not infer that he meant to prefer the general legatees to them; and for the further reason that there was a specific devise of real estate and personal property, and that it was fair to presume that it was the rest of the real estate which he gave after that specific devise of real estate.

*Reynolds v. Reynolds* (16 *N. Y.*, 257) is another leading case on the subject. There the testator bequeathed a legacy of \$1,200 to his son, and ordered that it, with other legacies, should be paid within one year, without directing out of what fund, and then bequeathed all his real and personal estate to two other sons and appointed them his executors. The personal estate was insufficient to pay the legacy of \$1,200, and it was held that the legacy should abate in proportion to the deficiency and that no part thereof could be charged on the real estate. The grounds of this decision being that the real estate could not be subjected to the payment of legacies unless an intention to that effect was expressed in or fairly to be inferred from the terms of the will; and that the question whether the real estate is charged is one of intention on the part of the testator, and that no such intention was indicated by giving real and personal property by the same clause of a will; and that the devise and bequest to the executors does not purport to be of the remainder of the estate. The language of the residuary clause was "all his real and personal estate," etc.—not the rest, residue and remainder.

In *Tracy v. Tracy* (15 *Barb.*, 503), it was held that where a testator had given three legacies of \$150

each, and then devised and bequeathed all the rest, residue and remainder of his estate, both real and personal, that the real estate was chargeable with the legacies together with the personalty, because there was a blending and combining of the real and personal estate in one devise and in the same clause of the will.

This case is considered in the Reynolds case (*supra*), and BOWEN, J., says that he thinks the decision was put on the wrong ground, viz.: the blending of the real and personal estate; that the real ground was because the rest, residue and remainder of the property were devised and bequeathed (see cases cited). The learned Justice does not pronounce the decision to be erroneous; on the contrary, he recognizes the correctness of the conclusion but objects to the reasoning.

The rule laid down in the Reynolds case and the Lupton case (*supra*) has been generally followed, and it is universally conceded that the intention of the testator must be either clearly expressed or easily presumed from the context of the will; all the surrounding circumstances, such as the amount of personal property owned by deceased at the time of the making of the will, and whether it was sufficient to meet the legacies charged upon it (*Wiltsie v. Shaw*, 100 N. Y., 191).

In *Hoyt v. Hoyt* (85 N. Y., 142) the testator, after directing that his debts be paid, bequeathed \$1,500 to each one of his three grandchildren, and all the rest, residue and remainder of his estate to his wife. Held, that the legacies were a charge on the land.

The court said that no man will make a legacy, save with the honest, sober minded intention that it will be paid, and when, therefore, the personal estate was known to the testator to be insufficient to pay the legacies, the bare fact of giving a legacy indicates an intention that it shall be met with the real estate.

I have carefully examined all the cases bearing on this point, the above being but a small number of them, and culled from the mass, as being most in point, *pro* and *con*, and as best setting forth the law.

The question is undoubtedly a very nice one and, as appears from all the authorities examined, turns simply on the point of the construction of the will and the intention of the testator. The general rule is laid down in *Lupton v. Lupton* (*supra*), and while this case has never been overruled the doctrine laid down has been held elastic enough, however, to justify marked distinction, as in one case there was a difference of the degree of relationship between the legatees and the testator from that in the *Lupton* case (*Scott v. Stebbins*, *supra*), and in another because the court assumed that the testator must have intended to charge his real estate with the payment of the legacies because the personal property proved to be grossly inadequate (*Manson v. Manson*, *supra*); and so on, in every case, while the general rule is recognized, it is not made applicable to that particular case because of certain extraneous facts and extrinsic circumstances surrounding it and peculiar to it.

The general rule of evidence as to the non-introduction and non-consideration of extrinsic facts, to determine what the intention of the testator might

be, has been construed very liberally when applied to such an intention as we are discussing. We, thus, may understand that the particular facts of each particular case, within a rather liberal line prescribed by the above line of decisions, must determine the intention of the testator.

Let us examine the facts in the case at bar in the light of the discussed adjudications. It is shown that the personal property of the testator at the date of the execution of the will amounted to about the sum of \$1,000, while the legacies amount to \$4,000. This fact can be considered and goes to show that the testator must have intended to charge his real estate with the payment of them. As was said in *Bevan v. Cooper (supra)*: "It is hardly to be supposed that a man of sense, engaged in the solemn and deliberate matter of making a final disposition of his worldly estate, would trifle with the subject by making bequests which he did not expect or intend should be satisfied." It is true that in this last case, the legacies were held not to be charges on the real estate, but for the reason among others, that the inadequacy of the personal property was not revealed until after the death of the testator, while in the case at bar it existed, and I think will be presumed to have been known to the testator at the date of the execution of the will.

In the fifth clause of the will the testator bequeathed all the rest, residue and remainder of my property, both real and personal, etc.

This to my mind, in view of the accompanying facts, is strong proof that it was the intention of the

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testator to charge the realty. There was no devise of real estate, specific in nature; the residuary clause contained the only devise of testator's realty.

The phrase rest, residue and remainder implies that the testator contemplated the appropriation of certain of his realty for some purpose, and there is nothing for which it can be used except the making up of the deficiency in the personalty. I think this conclusion is fully sustained by the above decisions.

Finally, another fact which influences me strongly is that the executors are directed to pay the general legatees during their minority the half yearly interest on their legacies. It is evident from this provision that it was the intention of the testator that these legacies should be paid, and, if necessary, from the realty.

The legacies must be held to be a charge on the realty.

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NEW YORK COUNTY.—HON. R. S. RANSOM, SURROGATE.—March, June, 1888.

MATTER OF ASTOR.

*In the matter of the estate of CHARLOTTA A. ASTOR, deceased.*

The practice to be observed under the "collateral inheritance tax" law (L. 1887, ch. 713, amending L. 1885, ch. 483), in the Surrogate's court of New York county—announced.

As to whether the "estate which may be valued at a less sum than five hundred dollars," declared not subject to tax by section 1, is that of the decedent or of his successor—*quære*.

The Surrogate is deemed the superior authority upon all questions, including that of value of the estate subject to the tax.

The order of the Surrogate, appointing an appraiser, will designate the persons upon whom the latter shall forthwith serve notices by mail; who will include all persons interested in the whole estate."

The Surrogate will not take any steps, upon his own motion, until the expiration of eighteen months after the decedent's death.

In case of a will, under which the legacies subject to the tax are in cash, the appointment of an appraiser is deemed unnecessary.

ASSESSMENT of tax, pursuant to L. 1885, ch., 483, and L. 1887, ch. 713, upon estates passing under decedent's will.

THE SURROGATE.—I have already written a memorandum in this proceeding announcing my decision granting the application of the executors for the appointment of an appraiser. I have deemed it proper to supplement that memorandum by some observations upon the construction to be given the act, chapter 713, Laws of 1887, which I believe will be useful to

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parties interested in estates subject to tax under the provisions of that act; and also the act, chapter 483, Laws of 1885, which in all the respects now under consideration is substantially, if not precisely, similar.

This legislation, in form and substance is justly entitled to severe condemnation for great looseness and incoherence of expression. There is no symmetry in its provisions, and it is impossible to be certain of the intention of the lawmakers in respect of the various steps which it may be necessary to take to effectuate its purpose. And if much is required by me to be done to put in motion the cumbersome and awkward machinery set up for the collection of taxes upon collateral inheritances, etc., which may seem to be unnecessary, the cause therefor must be looked for within the halls of legislation, where this anomalous statute was invented and sent forth to confuse, and therefore exasperate the personal representatives of deceased persons and the courts, by its glaring inconsistencies and absurdities.

After much patient reading and re-reading of this act, I have concluded upon a course of procedure which I hope and believe will bear the test of superior judicial investigation. Fortunately, the constitutionality of the law cannot now be mooted. The Court of Appeals has settled that (*Matter of McPherson*, 104 *N. Y.*, 306).

The object of the act, as disclosed by its title, is "to tax gifts, legacies and collateral inheritances in certain cases." Section 1 provides that "all property which shall pass by will, or by the intestate laws of this State, from any person who may die seized or pos-

sessed of the same . . . . . other than to or for the use of his or her father, mother, husband, wife, child, brother, sister, the wife or widow of a son, or the husband of a daughter, or any child or children adopted as such in conformity with the laws of the State of New York . . . . . shall be and is subject to a tax of five dollars on every hundred dollars of the clear market value of such property . . . . . to be paid to the Comptroller of New York for the use of the State ; and all administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid . . . . . provided that an estate which may be valued at a less sum than five hundred dollars shall not be subject to such duty or tax.

It is not my purpose now to attempt to answer whether the expression "an estate" in the last sentence of this section means the whole estate of the deceased person or only so much thereof as passes to a person other than one of those exempted from the tax. This question may be presented some time, as for instance in case of a will bequeathing an entire estate worth over \$500 to two or more persons, in amounts of less than that sum each. Nor shall I speculate upon the office and purpose of the word "duty," the last word but two in this section. It seems to be synonymous with the last word, "tax," but it may be that it was interpolated for the purpose of embellishment.

To my best understanding, section 2 provides that when any "grant, gift, legacy or succession, upon which a tax is imposed by § 1, shall be an estate, income or interest for a term of years or for life . . . . .



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the entire property or fund by which such estate, income or interest is supported, or of which it is a part, shall be appraised immediately after the death of the decedent at what was the fair market value thereof at the time of the death of the decedent, in the manner hereinafter provided (see § 13), and the Surrogate shall thereupon assess and determine the value of the estate, income or interest subject to said tax, in the manner recorded in § 13 of this act."

By reference to § 13, for "recorded" provisions, we find that the value of the estate is to be ascertained by an appraiser, who shall be some "competent person appointed for that purpose, who shall appraise the same at its fair market value," and upon his report the Surrogate shall fix the then cash value of estates, annuities, life estates, etc.

Thus it seems by § 2, the Surrogate is to appraise in person, otherwise how can he "determine" the value of the estate. And by § 13, the appraisement is to be made by another officer, whose appraisement ought to be final, if made in good faith. Reading these two sections of the act together, I believe the value of all the estates subject to the tax must be ascertained by an appraiser, before whom all parties interested have the right to appear. This must be so, else why the provisions "recorded" in § 13, requiring the appraiser to forthwith give notice to "all persons known to have or claim an interest in such property of the time and place he will appraise such property." And the appraiser must also give such notice to such persons as the Surrogate may by order direct. Thus it may seem that the appraiser has another duty separate

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and apart from the Surrogate, viz.: to exercise his own judgment as to what persons shall have notice and then look to the Surrogate's order for the names of any other persons discovered and designated by him.

I shall not commit myself to such a construction. The act, considered in its entirety, beyond reasonable doubt, I think, intends that the Surrogate shall be the superior authority upon all questions, including that of value of the estate subject to the tax; and means that he shall act judicially, although it is a new and strange duty imposed upon a judge that he shall become an appraiser of the value of all kinds of property which may be the subject of a gift or legacy, and an assessor of taxes to be levied thereon. Nevertheless, such seems to be the additional function bestowed upon the Surrogates of this State by this law, and they will no doubt faithfully strive to do their full duty in this new field of labor.

This section (2) further provides: "And the tax prescribed by this act shall be immediately due and payable to the treasurer of the proper county, and in the city of New York to the Comptroller thereof, and together with the interest thereon shall be and remain a lien on said property until the same is paid." And then in the next sentence of this same section it is declared in effect, almost in express words, that the tax shall not then become due and payable if the person or persons beneficially interested in the property chargeable with said tax may elect not to pay the same until the happening of an event which may never happen at all, to wit: until they shall come into the actual possession or enjoyment of such prop-

erty. I am curious to know just how one can come into the "enjoyment" of a bit of property and not at the same moment come into its "possession." The framer of this act has not given us any information on that point.

Section 4 also restates the point of time when "all taxes imposed by this act become due and payable, unless otherwise herein provided for, viz.: at the death of the decedent; and then we find in the very next sentence that if they are paid within eighteen months, no interest shall be charged and collected thereon; but if not so paid, interest at the rate of ten per cent., per annum, shall be charged and collected from the time said tax accrued, provided if it (the tax) is paid within six months from the accruing thereof, a discount of five per cent. shall be allowed and deducted from said tax; and further, that if the executors, administrators or trustees do not pay such tax within eighteen months from the death of the decedent, they shall be required to give a bond in the form and to the effect prescribed in § 2.

We have here in the same section certain conditions and limitations, all dependent upon the point of time when the tax accrues, and another condition and a positive requirement dependent upon the date of decedent's death. It seems reasonably certain that the tax must be said to have "accrued" at the date of decedent's death, although it might be insisted with force of reason that it has not accrued until the appraisal has been made and the amount finally assessed by the Surrogate, after the numerous hearings upon the one question—that of value of property and liability

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for the tax, have been given to all persons interested. It seems equally certain, however, that a tax cannot be said to be "due and payable" at a time when the party liable for its payment is not bound to pay it.

When we have applied the provisions of this act to real cases in the varied phases of the rights of persons, as they will no doubt be made to appear, we may unfathom its hidden mysteries, and that which now seems so dark and dubious may then become clear and open to our mental vision. No doubt remains, I think, but that for the full period of 18 months from the date of decedent's death, the persons liable to pay the tax may be relieved from its payment, although by § 16 it is made the duty of the Surrogate's court (not the Surrogate) if it shall appear to that court "that any tax accruing under the act has not been paid according to law," to issue a citation, etc. And, further, by § 17 we find that whenever the treasurer or comptroller of any county shall have reason to believe any tax is due and unpaid under this act (and we have seen twice provided that it shall be "due and payable" at decedent's death), he shall notify the district attorney in writing, and then that officer is required to sit in judgment on the case made out by the treasurer or comptroller to see whether he (the district attorney) has probable cause to believe a tax is due and unpaid. Mark the expression "a tax" instead of "the tax." This may be a side light to be regarded upon the question—to whom has been committed the final appraisal and assessment so far as the State is concerned? But it seems to me that the decision of the Surrogate's court upon that subject is final upon the rights

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of the State in the premises, except of course for fraud or refusal to act.

For present purposes we may now pass on to § 13 of this act (ch. 713) and briefly as may be possible for our attempt to a fair understanding of its provisions, consider how it shall be carried out. This section provides the mode of fixing the "value of property of persons whose estates shall be subject to the payment of said tax." I fancy that the phrase "whose estates shall be subject to the payment of said tax," means the estates of decedents; although we must admit that this is not literally true, for if anything can be said to be clearly expressed in this law, it is the fact that only certain parts (and portions) of such estates are subject to it. Nevertheless, I hold as above stated. But for execution of the law we should read this section as if the words of this phrase were not there.

I hold, therefore, that the Surrogate acting judicially as a court must, upon the application of an "interested party," who may be any person having an interest in the whole estate, who is now designated by law, and also the county treasurer, and in New York the comptroller, represented by the district attorney, and on failure of any such person to apply upon his own motion (no time is named when he shall move himself) appoint some competent person as appraiser from time to time if occasion requires, whose duty it shall be to forthwith give notice by mail to all persons known to have or claim an interest in such property, and to such persons as the Surrogate may by order

direct, of the time and place he will appraise such property.

Under any construction of this section and procedure spelled out, I fail to perceive that there would ever be more than one occasion to appoint an appraiser. I hold also that the order of the Surrogate appointing the appraiser should designate the persons upon whom the appraiser shall forthwith serve notices by mail; and these persons, for the sake of certainty and finality of proceeding, should be all who are now by law interested in the whole estate and by law entitled to notice of all proceedings affecting the same. This section does not provide for the length of notice. I hold, therefore, that it is the duty of the Surrogate to fix it; and the facts in each case must be his guide in that regard.

All parties notified by the appraiser have the right to attend before him and to be heard upon the question of value of the property and its or their liability to the tax. The appraiser must report to the Surrogate the fair market value of the property he deems subject to the tax, together with his proceedings and any and all facts known to him germane to the duties imposed upon him by the order of his appointment. He has not, however, any right under this act to administer oaths and take testimony upon any of the questions to be considered by him. This seems a most regretful lack of power, which should have been conferred upon him for obvious reasons.

On the coming in of the appraiser's report, the Surrogate, it is provided, shall forthwith assess and fix the then cash value of all estates. Whether there might

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not be a real difference between the "fair market value" and the "cash value" of all estates, and hence more confusion, I do not stop to discuss. I hold that the two expressions mean the same thing in this act.

The section provides that the Surrogate shall first assess, etc., and then mail notices, etc. I hold that just the reverse of this shall be our practice.

On the coming in and filing in the Surrogate's court of the appraiser's report, the Surrogate shall give notice thereof by mail to the same parties immediately. He must act "immediately"—the appraiser "forthwith" in respect of the same thing precisely. I feel compelled, however, to determine that the law-makers intended these to be convertible terms, and that the requirement in this regard will be met by such prompt notice as the Surrogate shall deem reasonable under the facts of each proceeding.

The notice of the Surrogate must fix the day and hour when he will hear any of said parties in regard to the subject-matter which had been committed to the appraiser by the order for his appointment; and thereafter the Surrogate must forthwith assess and fix the true cash value of all estates.

The last paragraph of this section pretty plainly points out the grounds and mode of appeal from this assessment by the Surrogate. But it is remarkable that the appeal is from the Surrogate to the Surrogate. One advantage has been gained, however, by the State, which in these devious ways has been seeking this tax—persons dissatisfied must give security for whatever tax shall be fixed by the court, and their time to appeal is limited to sixty days.

Section 16 of this act makes it the duty of the Surrogate's court to issue a citation citing the persons interested in the property liable to the tax to appear before the court on a day certain to show cause why the said tax should not be paid.

Section 17, which might well have preceded § 16, I think, makes it the duty of the county treasurer or comptroller, whenever he shall have reason to believe that any tax is due and unpaid under the act, after the refusal or neglect of the persons interested in the property liable to the tax to pay the same, to notify the district attorney in writing.

Section 18 provides that "the Surrogate and county clerk of each county shall every three months make a statement in writing to the county treasurer or comptroller of his county of the property from which, or the party from which (*sic*) he has reason to believe a tax under this act is due and unpaid."

Reading these three sections (16, 17 and 18) as one, and having due regard to the other provisions of the act, I hold that the Surrogate should not take any steps upon his own motion until the expiration of eighteen months after the date of the decedent's death. At that point of time he should ascertain from the proceedings generally in his court relating to the estate, from the will, if there be one, and from any source open to him, whether "any tax accruing under this act has not been paid according to law," and if it shall appear to him that it has not been paid, to issue the citation and take the proceedings provided for in section 16. I am of opinion also that, until the expiration of eighteen months after decedent's death, the



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comptroller and district attorney ought not to initiate any proceeding except on the former's application, as I have already shown, for the appointment of an appraiser: because the intent of the act is undoubtedly to relieve the estate and persons interested therein, and the administrators, executors or trustees, at their option, from the payment of the tax during eighteen months next succeeding the date of decedent's death.

I hold that in the case of a will, under the provisions of which the legacies subject to this tax are in cash, the appointment of an appraiser is unnecessary. The Surrogate on application, or on his own motion, shall appraise the value of this species of property and assess the tax by order, and thereupon give notice to all persons, as hereinbefore shown.

Section 20 seems to exclude from record in the book to be kept by the Surrogate cash subject to the tax. This is not true of the real intent of the section read in the light of the other provisions of the act. This book must contain all that is specifically mentioned in this section and also the property in cash subject to the tax and the tax assessed thereon.

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APPLICATION to confirm appraiser's report, June 13th, 1888:

THE SURROGATE.—I have heretofore expressed my views of the construction to be given to the Collateral Inheritance tax act in respect to the various steps to be taken in ascertaining the property liable to the

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tax and the appraisal of the same (7 *Surr. dec.*, p. 161, estate of Astor). I have not had reason to change or modify that decision, nor has it been questioned or adversely criticised by any appellate tribunal.

Under that decision we have proceeded with considerable confidence in the correctness of our practice. Appraisers have been appointed upon the assumption that the orders of their appointment were in exact compliance with it. In the main, these orders were no doubt exact, but as the cases have not been contested my attention has not been specially attracted to the form of each order, nor to the appraiser's reports made in pursuance thereof.

As the present proceeding is the one in which I first considered (with some care) the act, my interest in the report of the appraiser, under the order for his appointment herein, has kept me mindful of my determination to carefully review it when presented for confirmation; and although the report was submitted after notice by me to all persons interested, without objection, and might in the ordinary course of business have been confirmed without special examination, relying, as I should have been justified in doing, upon the comptroller for any valid objections thereto, I have given it careful examination, and, without meaning to overrule any conclusions reached by the appraiser, I must decline to confirm his report in its present form.

I do not intend to express any opinion upon the question of exemption of the legacies from the tax; that question is not properly before me under this report, nor could it be in any case, except on ob-

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jection by a legatee whose interest in the estate had been held liable to the tax by the appraiser.

The appraiser should report any property, estate or interest therein "subject to the tax." This duty is plainly devolved upon him by § 13 of the act in these words, viz.: "In order to fix the value of the property . . . subject to the payment of said tax, the Surrogate . . . shall appoint some appropriate person appraiser," etc. The appraiser is not appointed to fix the value of property which is not subject to the payment of the tax. In the case under consideration, he has devoted much of his time and labor to the question of what property is exempt therefrom. It is true that in order to ascertain what property is subject to the tax and its fair market value, he necessarily ascertains that certain other property is not subject to it—that is, exempt. But his duty, as I conceive it to be, is not to report such exemptions. If, in the view of any person interested, the appraiser has not reported all property subject to the tax, such person could and should raise the question on the coming in of his report; and if in the right, the report should be sent back with instructions to appraise the fair market value of such property.

In this proceeding the appraiser was justified by the order of his appointment in reporting certain legacies as exempt from the tax. That provision of the order escaped my observation when it was signed.

Such provision was improper; but as the order was in all essential particulars right it may be disregarded. The appraiser's report, when confirmed, is in the nature of a decree imposing a tax upon certain de-

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scribed property; and, so far as the State of New York is concerned, at least, must be final in respect of any future claim for this tax upon all property then in existence and known to the appraiser, always, of course, assuming that he acted in good faith and without concealment or fraud on the part of the persons interested in such property.

If the appraiser should be in doubt as to the liability of any property to the tax he should report it subject thereto, and in that case any person dissatisfied has ample protection, provided for by § 13 of the act by appeal to the Surrogate in the event that the appraiser is sustained on the coming in of his report, by giving security for the tax, and further protection by appeal from the decree of the Surrogate by the usual steps to the court of last resort.

So far as the State is concerned the legislature intended, I think, that the Surrogate, aided by the appraiser, shall be the ultimate power. Therefore, exemptions from the tax should not be adjudged except upon the facts to be ascertained by the Surrogate according to usual methods in a court of justice. The appraiser has no right to take testimony under oath and, except in the plainest case, he ought to hold all property passing by the will of a resident, or by the intestate laws of this State subject to the tax. It is easy to imagine a case where the claim of a person interested that his property is not subject to the tax can only be disposed of, in justice to him and to the State, by the examination of witnesses, by the laying in evidence of documents, etc. In such a case I am of opinion that the Surrogate has the power

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under the act, and if so, then such would be his duty, to require legal proof of all the facts pro and con.

In the present case the appraiser has found certain legacies exempt from the tax, and no doubt he has so found upon evidence which to his mind is satisfactory and conclusive; but he has not reported those facts to me, nor indeed could he do so under this law in such form as to be obligatory upon me or in the least satisfactory, because he has no right to examine witnesses under oath. In this case the appraiser refers to briefs of counsel to sustain his findings. I need not, I am sure, spend any time in showing the impropriety of such reference. The great eminence of counsel and the supreme confidence of the appraiser and of myself in their learning does not authorize me to pass a decree depending upon their briefs to sustain its recitals. The appraiser should have relied upon facts and stated them, and upon adjudicated cases and text books and cited them.

However, this does not so much matter, because I hold that his report must be amended by striking out all that portion of it which exempts legacies named, and should mention only such property as he finds subject to the tax, and all of such property, and to so expressly report. As I have attempted to show on the confirmation by the Surrogate of his report, proceedings to collect this tax on property then in existence are at an end, and all property not then held subject to the tax may be distributed free of any further claim by the State. In some other respects the report of the appraiser should be amended, and to

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save all question of his authority, an order reappointing him should be handed up.

*First.* The appraiser reports that he has appraised the property both real and personal, of the deceased "made known to him by the executor of the will." This is erroneous. The appraiser should appraise the property subject to the payment of the said tax, and the source of his information need not necessarily be stated; at all events, he should unequivocally report that he has appraised *all* property subject to the payment of the tax.

It may be that an executor by inadvertence, forgetfulness or fraud may fail to disclose all property of the deceased subject to the tax. The appraiser is not precluded by such information, nor has he properly performed his duty if he seeks for no property beyond that which is disclosed by the executor; and his report should be that he has appraised all property subject to the tax, giving the name of the owner or person having an interest therein and if, in his judgment, his means of ascertaining the extent of such property may be pertinent and material for the information of the Surrogate, he should state them. He cannot assume, however, that information from the executor—or from any other person, for that matter—is conclusive.

The appraiser in this case has also stopped a little short of his duty under the act in respect of notices by mail to persons known to have or claim an interest in such property. He reports that he has given notice by mail, postage prepaid, of the time and place of said appraisal to each of the persons to whom the Surrogate did by said order direct. It may be that these persons

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are all who have any claim or interest in such property, but the appraiser has an independent duty to perform under my construction of the act, heretofore given in this matter.

I deem it the duty of the Surrogate to ascertain the names of persons known to have or claim an interest in such property at the time of appointing the appraiser, and that such names shall be given in the order, and to them the appraiser must give notice. He is not, however, relieved by such order from inquiry for any other person or persons known to have or claim an interest in such property, and he should not only report service upon persons named by the Surrogate, but the additional fact that they are, or are not, all the persons known to him, the appraiser, to have or claim an interest in such property.

The appraiser reports: "I have appraised the property of said Charlotte Augusta Astor, deceased, as follows." This is not in accordance with the requirements of the act. It provides that he shall appraise such property at "its fair market value." He has omitted to state that he has thus appraised it.

The petition for the appointment of appraisers in testate cases may be as follows :

" Title.

" To ———, Surrogate.

" The petition of ——— respectfully shows :

" First—Your petitioner is ———, and as such is a person interested in the estate of the above-named decedent.

" Second—That the said decedent departed this life

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on the \_\_\_\_\_ day of \_\_\_\_\_, in \_\_\_\_\_, and that he was a resident of this State.

“Third—That said decedent left a last will and testament, which was on the \_\_\_\_\_ day of \_\_\_\_\_ duly admitted to probate, and that \_\_\_\_\_ are the executors of said will, and that their post-office addresses are : \_\_\_\_\_

“Fourth—That, as your petitioner is informed and believes, the property of said decedent, passing by said will, or some portion thereof, or some interest therein, is subject to the payment of the tax imposed by the law to tax gifts, legacies and collateral inheritances in certain cases.

“Fifth—That all the persons who are interested in said estate, and who are entitled to notice of all proceedings herein, including the Comptroller of the city of New York, and their post-office addresses are as follows, viz. : \_\_\_\_\_

“Wherefore, your petitioner prays that you will appoint some competent person as appraiser, as provided by law.

“And your petitioner will ever pray.

“(Verification.) \_\_\_\_\_, petitioner.”

This form may be varied to suit intestate cases.

The order appointing the appraiser may be in the following form :

Caption.

Estate of \_\_\_\_\_.

“On reading and filing the petition of \_\_\_\_\_, praying for the appointment of some competent person as appraiser under and in pursuance of the law to tax



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MATTER OF ASTOR.

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gifts, legacies and collateral inheritances in certain cases, it is ordered that ———, Esq., be and he hereby is appointed such appraiser.

“It is further ordered that said appraiser shall give the notice required by said law in the manner and at the time therein set forth (and said notice shall be ——— days), to the following persons and to all other persons known to have or claim an interest in the property of ———, the decedent in the above entitled proceeding, subject to the payment of said tax, viz.: (Here take in names of persons to be served with notices.)

The form of the appraiser's report may be as follows:  
Title of proceedings.

To ———, Surrogate: “I, the undersigned, who was on the ——— day of ——— appointed appraiser under and in pursuance of the law to tax gifts, legacies and collateral inheritances in certain cases, a certified copy of which order is hereto attached, respectfully report:

“First—That forthwith after my said appointment, I gave notice by mail, postage prepaid, to all persons known to have or claim an interest in all property subject to the tax imposed by said law, and to the following named persons, being those named by the Surrogate in the said order, of the time and place I would appraise the property of ———, deceased, subject to the payment of said tax; a true copy of said notice is also hereto attached. (Here take in names.)

“Second—I further report that at the time and place in said notice stated, to wit: on the ——— day

## MATTER OF ASTOR.

of—— at —— I appraised all the property of said —— deceased, subject to the payment of said tax, at its fair market value, as follows, to wit: (Give minute description of the property appraised, name of owner or person interested therein and his post-office address, and the fair market value of such property.) All of which is respectfully submitted.

“ —— ——, appraiser.”

The appraiser before entering upon his duties should take the oath of office required by general law to the effect that he will faithfully and fairly perform the duties of such appraiser and make a just and true report according to the best of his understanding. This oath of office should also be attached to his report.

The Surrogate, on the coming in of the appraiser's report, should, if he confirms it, make an order to that effect, and he must forthwith assess and fix the then cash value of said property, subject to the payment of said tax. His order may be in the following form:

Caption.

Title of proceeding.

“On reading and filing the report of ——, the appraiser herein, and after hearing —— in support of said report and —— in opposition thereto, ordered:

“First—The said report is in all respects confirmed.

“Second—The cash value at this date of the property mentioned and described in said report, which is subject to the payment of the tax imposed by law taxing gifts, legacies and collateral inheritances is as follows: ——.

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ESTATE OF HASTINGS.

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“Third—That the tax to which the said property is liable is as follows, viz.: ———.

“——— Surrogate.”

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NEW YORK COUNTY.—HON. R. S. RANSOM, SURROGATE.—May, 1888.

## ESTATE OF HASTINGS.

*In the matter of the estate of ERNEST HASTINGS, deceased.*

In a special proceeding, instituted by executrix, under Code Civ. Pro., § 2706, to discover certain personal property alleged to belong to decedent, and to be in the possession of respondent, the latter filed an answer, setting forth “that the only chattels or property of any kind in the possession of this respondent were and are such ornaments which were, preceding the death of said” decedent, “given to this respondent by said decedent” . . . . . “and that the same is her own property; and that the said” executrix “has no title or interest therein; and that she has no books or papers or property of any kind belonging to said estate.”—

*Held*, insufficient to justify a dismissal of the proceedings.

SPECIAL proceeding instituted to discover assets alleged to belong to decedent's estate, and to be withheld by respondent.

THE SURROGATE.—This is an application under § 2706, by executrix of deceased, for an order directing respondent to submit to an examination as to the whereabouts of certain personal property of deceased.

## ESTATE OF HASTINGS.

The personal property which is sought is described at length in the petition. The respondent obtained an order for executrix to show cause why the proceeding should not be vacated, and filed an answer to the petition, alleging "that the only chattels or property of any kind in the possession of this respondent were and are such ornaments which were, preceding the death of said Ernest Hastings, given to this respondent by said decedent, who was at said time engaged to be married to this respondent; and that the same is her own property; and that the said Edith Hastings, as executrix, has no title or interest therein; and that she has no books or papers or property of any kind belonging to said estate of Ernest Hastings."

The Code provides (§ 2710): "In case the person so cited shall interpose a written answer, duly verified, that he is the owner of said property, or is entitled to the possession thereof by virtue of any lien thereon or special property therein, the Surrogate shall dismiss the proceedings as to such property so claimed."

I do not think the answer interposed by respondent is sufficient; it is too general. She does not allege that she is the owner or is entitled to the possession of the specific property described in the petition by virtue of any lien thereon or special property therein; and the allegation that she has no books or papers or property of any kind belonging to the decedent's estate would not be sufficient to dismiss the petitioner's proceeding; for in order to do this it must appear in the answer that the respondent *has* possession of the specific property described in the petition, but is the owner of it.

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MATTER OF WHELAN.

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The motion for discovery is granted. The motion to vacate and set aside order and citation for the examination of respondent is denied.

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NEW YORK COUNTY.—HON. R. S. RANSOM, SURROGATE.—June, 1888.

## MATTER OF WHELAN.

*In the matter of the estate of PATRICK WHELAN, deceased.*

In probate cases, the court in this county will, under the authority conferred by Code Civ. Pro., § 2557, mulct a contestant in costs, who is not characterized by *good faith* in his opposition. ....

*Good faith*, in the respects referred to, declared to imply, not only an earnest, honest belief in the justice of one's claim, but also the conscientious exercise of reasonable business judgment, which should induce the party to avoid needless delay and expense by taking advantage of his opportunity and right to attend and cross-examine the subscribing witnesses on the return of the citation.

SETTLEMENT of decree admitting decedent's will to probate.

THE SURROGATE.—This is an application by proponent to charge the contestant personally with the costs of the contest. I am afforded the opportunity to give formal expression of my views on the subject of contests forced upon the proponents of wills by disappointed next-of-kin, who, in virtue of our very liberal statute, may without the shadow of just cause,

compel the beneficiaries under the will to suffer unavoidable delay and expense, whilst a contestant indulges in a fishing expedition.

The practice of filing objections to wills without real cause for believing that the decedent was incapable, or was the victim of fraud and undue influence, is most reprehensible. In many cases, I think the majority, objections are filed and withdrawn at once the subscribing witnesses are examined; and in the case now under consideration, it seems by the affidavit of the attorney for the contestant, they were withdrawn without even notifying the proponent's attorney, whose proceedings were therefore further delayed and additional expense incurred.

The simple inspection of any paper propounded for probate as the last will of a decedent will inform the persons interested or their attorneys whether the formalities required by law have been complied with. No contest need be instituted for that purpose; and if it is, it is not in good faith. So, also, the persons interested may gain perfect information of the facts within the knowledge of the subscribing witnesses by attending before the probate clerk and taking part in their examination. A contest in court is not needed for that purpose, and if instituted it is not in good faith.

Good faith means much more than simple freedom from any intent to wilfully block the expeditious probate of the paper propounded or to hinder and delay the proceeding for the purpose of forcing some recognition of fancied rights, or to grope about with a wavering hope that something may turn up which

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MATTER OF WHELAN.

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shall be of advantage. The means afforded by our statutes and practice are ample to afford all persons complete information upon which to base a contest by such inquiries as can be made before the probate clerk.

Good faith means not only an earnest, honest belief in the justice of one's claim, but also in the respects now under consideration, I hold it to be the conscientious exercise of reasonable business judgment which should induce the party to avoid needless delay and expense by taking advantage of his opportunity and the right given him by law to attend on the return of the citation and obtain leave to cross-examine the subscribing witnesses.

On the affidavit of the contestant's attorney in this proceeding one fact is made very plain, to wit: that he had no facts, absolutely none, on which to found a contest, and his only hope was evidently grounded upon some notion that delay and expense might in some way benefit him, or that the subscribing witnesses, either or both, might turn out to be forgetful or fraudulent persons. He surely could not have expected to sustain his objections by them unless they were one or both. A contest was not proper or necessary to develop any such expectation or suspicion. In one hour or less before the probate clerk, who is an assistant to the Surrogate, and authorized to take the testimony and in duty bound to report it to him in all cases, any fact justifying such expectations or suspicion could have been made plain. Instead of taking this course the contestant has compelled by his objections long delay and considerable labor thrust upon

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MATTER OF SELLING.

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the proponents and upon the court, all of which ought to have been avoided.

If the contestant in this proceeding—and I believe such would be the fact in the majority of all similar proceedings—had acted in good faith, as I have defined that expression, this will would have been admitted to probate on the return day of the citation. Nothing has been done by the contestant since that might not have been done then.

The law gives the Surrogate the power and makes it his duty to impose the costs upon the estate or fund, or upon the party personally, as justice requires (Code, § 2557). In this proceeding I have no doubt that justice requires the contestant to pay the costs, and I so decide. In all cases of contest I shall hold the contestants strictly to the doctrine laid down here, and in all cases applicable I shall charge the entire costs upon them.

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NEW YORK COUNTY.—HON. R. S. RANSOM, SURROGATE.—August, 1888.

## MATTER OF SELLING.

*In the matter of the estate of ERNESTINE SELLING,  
deceased.*

Where it appears that objections to the account of a decedent's personal representative, interposed by distributees of the estate, are not made in good faith,—as where the object sought is to delay the settlement



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MATTER OF SELLING.

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and distribution, the court will, in the exercise of its statutory discretion, charge the costs and disbursements of the accounting, including the fees of the referee, to the objectors personally, and the same will be collected by deducting the amount from their respective shares of the estate in the accounting party's hands.

Matter of Whelan, *ante*, 425—compared.

MOTION to confirm report of referee, to whom were referred the account of executor of decedent's will, and objections thereto, filed in proceedings for judicial settlement.

THE SURROGATE.—The report of the referee was confirmed, on the argument. I reserved consideration of the question whether the expense of the reference should be borne by the objectors personally. The executor has filed an affidavit of his attorney to sustain his motion to charge such expenses to the objectors personally, and proves thereby that the objections were filed for the sole purpose of preventing distribution until the objectors could be prepared with an action against the executor. This statement was made to the executor's attorney by the attorney of the objectors and is not denied by him. He simply swears that he does not remember it. The attorney for the objector and one of his clients stoutly contend by affidavit and argument that the objections were all filed in good faith. I have heretofore given the true definition of the expression "good faith." (See Matter of Whelan, *ante*, 425).

This proceeding differs somewhat from that, as here I do not believe the objectors were actuated by motives involving moral turpitude. But they cannot be held to have acted in good faith if we have due regard

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MATTER OF SELLING.

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for the motives confessed by their attorney. Their act in objecting may, perhaps, be fairly described as a bit of strategy in the course of their campaign to assert title in their father to a considerable portion of this estate, which the executor here had in possession as a part of the testator's estate.

To this view I commit myself. The statute provides that, if justice requires, the Surrogate may charge the costs of the contest upon the contestant personally, or upon the estate. It is manifest that the success of the objectors occasioned the delay incident to this reference, made necessary by their objections, notwithstanding the reference proceedings were forwarded with gratifying industry and brought promptly to a close, and thus reducing such delay to the minimum, they should not be at the expense of the estate, as thereby other persons interested therein, and not interested in the scheme of the objectors, would be compelled to suffer to some extent.

I conclude, therefore, that the expense of this reference—viz., the costs allowed by me to the special guardian for his services therein and the attorney for the executor and the disbursements, including referee's fees—must be paid by the objectors personally, and such payment will be made certain by deducting the amount from their respective shares of the estate in the hands of the executor.

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MATTER OF FROST.

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NEW YORK COUNTY.—HON. R. S. RANSOM, SURROGATE.—June, 1888.

## MATTER OF FROST.

*In the matter of the estate of PHILEMON FROST, deceased.*

Testator's will contained a bequest to his wife, M., of certain leasehold property, in lieu of dower, and, after making other dispositions, gave the residue to his daughters. M. elected to take her dower instead of the leasehold, and claimed one third of the latter under the statute of distribution in case of intestacy.—

*Held*, that the leasehold property fell into the residue.

*Kerr v. Dougherty*, 79 N. Y., 327—distinguished.

CONSTRUCTION of will, upon judicial settlement of executors' account. The facts are stated in the opinion.

JACKSON & BURR, *for executors.*

F. W. HINRICHS, *for widow.*

THE SURROGATE.—The decedent died leaving him surviving his widow, Mary E. Frost, and four daughters, children of a prior marriage. There were no children born to the testator by his second wife and since his death she has married again. Among the provisions of the will in her behalf, in lieu of dower, is a bequest of certain leasehold property described as No. 64 west forty-eighth street. She rejected the provisions of the will in her behalf, and elected to take her dower in the real estate.

## MATTER OF FROST.

The leasehold property above referred to has been sold by the executor, and upon the final settlement of his account the widow now claims that it did not fall into and become a part of the residuary estate, but that as to it, the testator died intestate and that it should be distributed as intestate property and that she should receive one third of the proceeds of the sale thereof.

The language of the residuary clause is as follows :

"All the rest, residue and remainder of my estate, both real and personal of every nature and description, I order and direct my executors and executrix hereinafter named. . . . to sell at public or private sale, and upon such terms as they may deem best."

I have no doubt but that the intention of the testator, if his widow elected to take her dower instead of the bequest in lieu thereof, was that the leasehold property should become a part of his residuary estate.

The case of *Kerr v. Dougherty* (79 *N. Y.*, 327), cited by the contestant, is clearly distinguishable from the case at bar. There it was held that the general rule that in a will of personal property the general residuary clause covers whatever is not otherwise legally disposed of, does not apply where the bequest is of a residue of a residue, and the first disposition fails.

The case of *Hatch v. Bassett* (52 *N. Y.*, 359), cited by contestant, has no bearing. In that case there was no absolute devise of the residuum to any one.

In the case of *Stephenson v. Orphan Asylum* (27 *Hun*, 380), cited by contestant, it was held that certain legacies having failed because not valid, a fund

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MATTER OF FARMER.

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remains not embraced nor intended to be embraced in the residuary clause of the testator's will and therefore it must pass to the next of kin under the residuary clause. This decision is put entirely upon the point of the intention of the testator.

In the case at bar, his intent clearly was to give this leasehold property to his wife in lieu of dower, or, if she elected to take her dower, she was to be cut off from further benefactions under the will.

On the other hand, there are numerous authorities upholding the construction sought by the executor (*Bowers v. Smith*, 10 *Paige*, 193; *Youngs v. Youngs*, 45 *N. Y.*, 254; *Estate of L'Hommedieu*, 32 *Hun*, 10; *King v. Strong*, 9 *Paige*, 93; *Van Kleeck v. R. D. Church*, 6 *Paige*, 600).

I hold, therefore, that the election of the widow to take her dower interest debars her from taking any share of the leasehold property, which has become a part of the residuum and goes to the residuary legatee.

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NEW YORK COUNTY.—HON. R. S. RANSOM, SURROGATE.—June, 1888.

## MATTER OF FARMER.

*In the matter of the estate of HANNAH FARMER, deceased.*

A direction in a will that the amount of certain legacies, thereby bequeathed, be deposited in a savings bank, there to remain for five years, and that at the expiration of that period the same be paid to the

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MATTER OF FARMER.

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legatees, they to receive the interest semi-annually in the interval, is not invalid, as unlawfully suspending the absolute ownership of personal property.

Smith v. Edwards, 33 *N. Y.*, 92—distinguished.

Warner v. Durant, 76 *N. Y.*, 133—followed.

CONSTRUCTION of will on application for probate.

THE SURROGATE.—By the provisions of this will \$2,000 was given to the daughter of testatrix, and the residue of the estate, after the usual direction as to debts and a legacy of \$50, was given to her son. The executors were directed to deposit the funds in a savings bank, paying the interest semi-annually to the beneficiaries; but the legacies were not to be paid until five years after her decease.

It is claimed by the contestant that such a disposition constituted an unlawful suspension of the power of alienation and the case of *Smith v. Edwards* (33 *N. Y.*, 92) is cited in support of this contention. That case is not in point; there the whole interest upon the fund in question was not given to the legatees but was diverted to other purposes during the delay of payment. This case comes clearly within the rule laid down in *Warner v. Durant* (76 *N. Y.*, 133).

Let a decree be presented admitting the will to probate.

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MATTER OF WILLETT.

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NEW YORK COUNTY.—HON. R. S. RANSOM, SUBROGATE.—June 1888.

## MATTER OF WILLETT.

*In the matter of the estate of MARGARET WILLETT,  
deceased.*

The statute restricting the fees of a referee, on the trial of an issue, to six dollars per diem is mandatory upon the court.

Upon an application for an allowance for "preparing for trial" of the issues raised in proceedings for the judicial settlement of an account, the court must be furnished with the detailed information prescribed by the rules, in order to enable it to exercise the discretion wherewith it is invested by the statute.

APPLICATION for re-taxation of costs in proceedings for the judicial settlement of trustees' account.

THE SURROGATE.—This is an application by the attorney for the trustees for the reconsideration of his claim for costs heretofore taxed.

The attorney for the trustees in the first instance presented presumably the facts by way of affidavit in such detail and with such particularity as our rules require in respect of services claimed by him for "otherwise preparing for trial." Excessive labor was in this proceeding imposed upon me in arriving at a just allowance to the trustees' attorney, which would have been materially reduced if he had regarded the rule and given me such detailed information as I am entitled to for the purpose of exercising that discretion which the statute invests in me.

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MATTER OF WILLETT.

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Upon personal *ex parte* application by way of letter addressed to me, I permitted him to file a supplemental affidavit upon his inferential motion for a reconsideration by me of his claim. Whilst conceding to this attorney this indulgence, I desire to be understood that, in all cases, I shall consider bills of costs sustained by affidavits but once, except in case of clerical error, fraud or mistake.

In this proceeding the trustees' attorney seemed to ignore completely the rule which has been in existence since the 1st of January last requiring some reasonably detailed statement of services for which per diem allowance is claimed. There is no evidence now presented that the trustees' attorney has, in proper regard for fair practice, served a copy of the supplemental affidavit to sustain his claim upon his adversaries.

My former decision upon this claim cannot be modified. It may be that the allowance granted by me by way of costs is not sufficient to properly compensate the attorney. In that event he should look to his clients, the trustees, for such compensation, and, if proper, they may be allowed the same upon a judicial settlement of their account. Upon the papers first submitted, including two certificates of the referee certifying to the time spent by him on the reference, I made him the allowance authorized by law. The attorney for the trustees, without having first obtained leave therefor, has intruded a supplemental certificate from the referee in which he now certifies that twenty-four days were occupied by him on the two references. This is an increase in number of ten days, and may be



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MATTER OF WILLETT.

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justified by the facts, although his first certificate is sustained by the affidavit of one of the contestants. The certificate of a referee is permitted by statute instead of a sworn statement, because of his official relations to the court. It goes without saying that he should be very careful to give correct, accurate and truthful information. Without intending to impute to this referee any impropriety whatever, I am unable to understand how he should have made a mistake of ten days between his two certificates. Under the facts, as they have been made to appear in this proceeding, I decline to modify my previous decision in regard to his allowance.

Parties before the court *sui juris* may, by written consent filed or by consent recorded upon the minutes before the referee, give him the right to fees in excess of those allowed by law, subject always to the approval of the Surrogate.

The referee admits that he has reckoned his services at the rate of \$10 a day. The statute is too plain for doubt that he cannot be allowed more than \$6 a day. It is impossible that he is not well acquainted with this mandatory law. So also is the attorney for the trustees. Yet they unite in urging that I shall actually disregard the statute. It is needless to say that I must decline to do so. The referee claims a considerable item for his expenses in traveling from New England to New York to attend the reference. I know of no provision of law that authorizes such a charge. I hope all referees and all attorneys will understand that I depend upon *proof* of substantial service rendered by each of them, and that I am controlled abso-

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MATTER OF M'COSKEY.

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lutely by the plain provisions of the statute in fixing their compensation therefor. I decline to indulge in judicial legislation.

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NEW YORK COUNTY.—HON. R. S. RANSOM, SURROGATE.—June, 1888.

MATTER OF McCOSKEY.

*In the matter of the estate of CATHERINE McCOSKEY, deceased.*

In dealing with statutes, it is the duty of a trial court, especially, to confine the exercise of its functions to strict interpretation, rather than to indulge in construction, bordering on the domain of legislation.

The "societies, corporations and institutions now exempted by law from taxation," referred to in the "act to tax gifts, legacies and collateral inheritances in certain cases" (L. 1885, ch. 483; L. 1887, ch. 713), do not include foreign bodies owing their immunity from taxation to foreign laws.

ASSESSMENT of "collateral inheritance tax."

M. A. RAYMOND, *for executor.*

BROWNELL & LATHROP, *for corporation.*

THE SURROGATE.—The question to be answered in this proceeding involves the construction to be given to the Collateral Tax act in respect of liability to the tax on gifts, legacies, etc., passing by the will of a resident of this State to "the societies, corporations

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MATTER OF M'COSKEY.

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and institutions now exempted by law from taxation," where, as in this proceeding, such "corporation" is a non-resident, created by the statute law of a foreign State, and by such statute law exempted from taxation.

To present the question sharply, it may be admitted that if the legacy, which is given by the will of this decedent, had passed to a corporation similar to this legatee, resident in this State, and organized and existing under and in pursuance of the laws of this State, the legacy would not be subject to the tax. That is to say, such legacy would be "exempted" by law from taxation.

Did the legislature intend to include such foreign corporations in the exempted class named in § 1 of the act under consideration? I am unable to so hold.

I have given a deal of time to the consideration of this Collateral Tax act, and have been much annoyed and puzzled by its provisions. That part of it bearing upon the question here has tormented me not a little. I am greatly gratified that the appellate court has at last this precise question before it, most ably and fully argued on both sides. I refer to the case of *Catlin v. Trustees of Trinity College*, now awaiting the decision of the General Term of the Second Department. No doubt, we shall in due time have the decision of the Court of Appeals in that case, which will instruct and enlighten us all, and set at rest all the doubtful and perplexing questions arising under this wretchedly drawn act. Very much has been said, and well said, in the argument and able briefs submitted to me in this proceeding, and I am frank to say that the more

## MATTER OF M'COSKEY.

I hear and the more I read and study the act and the numerous authorities cited, *pro* and *con.*, the more uncertain I am. I have, however, reached a conclusion which seems to me just and lawful.

Statutes should be strictly construed in my judgment, always at least by trial courts. Interpolating words, or striking them out, in order to square the act with the construction given, perverting the ordinary meaning of language used, by enlarging or restricting it, if ever allowable, should not be resorted to by a court of first impression. Such liberty taken with a statute is akin to legislation; and, I need not suggest, the courts are absolutely prohibited from exercising legislative functions.

This statute should be, in my view, strictly construed for another reason, not only by me, but by courts of appellate jurisdiction, because it is claimed here that its provisions mean that the property passing by the will of this decedent to this legatee is "exempted" from a duty and tax imposed upon certain other less favored persons, as, for instance, a nephew or niece, although kin of the decedent, and mayhap an actual resident of this State, shall pay this duty and tax as a condition of receiving his benefaction under the will; whereas this legatee—a foreign corporation, neither named nor, to my mind, thought of by the lawmakers—shall go free in virtue simply of the force of statutes of a foreign State, relieving it there for reasons of internal policy from taxation.

Comity between States certainly does not help this legatee. Comity means, generally, reciprocity; and there are no reciprocal relations on this subject

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MATTER OF M'COSKEY.

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between New York and Massachusetts. The notion that a foreign corporation of a class "exempted" by our laws from taxation shall therefore be entitled to receive rich endowments by the will of a resident of this State, whose accumulations were made under the protection of our laws, and thus making it possible for him to make the gift, without taking therefrom a duty and tax to be used toward the expense of maintaining our State Government, is to me repugnant to every consideration of natural justice and violative of all rules of common sense. Statute law, however, is too often in the very face of both.

All property within the jurisdiction of this State may be subjected to tax. All is subject to tax except it be exempted therefrom; and no authority need be cited for this proposition, nor for this:—that every statute of exemption must be strictly construed. Our own Court of Appeals has given us a plain, just and sensible rule many times over for our guidance in construing all statutes, viz.: "In construing any statute, the intention of the law-makers must be sought for. That is the grand central light in which all statutes must be read. The intention, however, is to be sought for in the language used; but for the purpose of understanding the language, the object the law-makers had in view and the motives which moved them to enact the law may be considered." *Hudson Iron Co. v. Alger* (54 *N. Y.*, 173, 175).

Under this plain rule the courts must construe this Collateral Tax act. And with respect to the question now under consideration, did the law-makers intend that this legatee, Williams College of Williamstown,

## MATTER OF M'COSKEY.

Mass., should be exempted from the tax? I think not. The very words of the act are: "All property which shall pass by will . . . from any person who may die, seized or possessed of the same, while a resident of this State . . . to any . . . body, politic or corporate . . . other than to . . . the societies, corporations and institutions now exempted by law from taxation . . . shall be, and is, subject to a tax of five dollars on every hundred dollars . . . of such property, to be paid to the treasurer of the proper county."

I hold that this language plainly imports the intention of the law-makers to be that corporations, etc., "exempted by law," are all corporations named specifically or by general description in our statutes as exempted. A foreign corporation cannot claim, of course, to be "exempted" from taxation by express provision of our laws. It is only such corporations as are the creatures of our laws, created by them and subject thereto, even the repeal of their charters being possible by our legislature, their very life dependent upon the will and pleasure of the law making power, that are intended to be relieved from the payment of this tax. It is such corporations that are "exempted." If the law-makers had said "the societies, corporations, etc., now exempt by law," etc., it might have been more plausibly argued that it was the intention of the law-makers to exempt all corporations, wheresoever organized and existing, of the same class as those organized and existing under our own statutes, the property of which, by the terms of the act, is not subject to taxation.

The question is, what property is subject to the tax?

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MATTER OF M'COSKEY.

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Certain named societies and corporations now (at the taking effect of the act) exempted by law shall not be liable to the tax, or to speak more precisely, property passing by will, etc., to them shall not be subject to the tax. What "law" is meant? I believe the legislature meant the law of New York, not the law of Massachusetts or of any other State. The legislature meant just what it plainly said in this regard. The laws of New York do not govern this college in the slightest degree. Her laws do not exempt it from taxation. The immunity it enjoys in that regard is accorded to it by the law of its domicil. The power that created it alone can extend or restrict its privileges. This college owes no duty, no allegiance to this State, nor does this State owe it any protection whatever.

To my mind, this legatee is bound to pay this tax by the plain provisions of the act; and above and beyond that, by obligations founded upon the plain, simple principles of fair play and even justice.

Let an order confirming the report of the appraiser be handed up.

NEW YORK COUNTY.—HON. R. S. RANSOM, SURROGATE.—June, 1888.

MATTER OF HATTEN.

*In the matter of the estate of MARY T. HATTEN, deceased.*

Where contestant of a will appealed, from a decree admitting the same to probate, to the general term, which reversed the decree and directed a trial in the Common Pleas, where proponent obtained a verdict, which was certified to the Surrogate's court, no motion for a new trial having been made,—

*Held*, that the latter court could not award to proponent costs of the appeal.

Schell v. Hewitt, 1 Dem., 249—compared.

TAXATION of costs, upon entry of decree admitting will to probate pursuant to verdict certified from Common Pleas.

THE SURROGATE.—The will of deceased was admitted to probate on October 18th, 1886, and from the decree admitting it an appeal was taken to the General Term of the Supreme Court, which, by an order entered August 20th, 1887, reversed the decree of the Surrogate, and directed certain issues of fact to be tried in the Court of Common Pleas before a jury. No direction as to costs of the appeal was made by the General Term. A trial of the issues resulted in a verdict in favor of the proponents.

No motion for a new trial was made by contestants, and after the lapse of ten days from the rendition of



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the verdict, *i. e.*, February 7th, 1888, the Court of Common Pleas certified this verdict to the Surrogate's court. The proponents now seek to tax their costs and disbursements of their appeal to the General Term, and of the trial had in the Court of Common Pleas.

In *Schell v. Hewitt* (1 *Dem.*, 249), this question was very carefully considered, and though the facts were somewhat different from those in the case at bar, the same principles must apply. It was held in that case that §§ 2558 and 2560, when compared with §2589 of the Code of Civil Procedure, while they provide, among other things, for the adjustment in Surrogates' decrees of costs in appeal proceedings, it is not their intention to give to the Surrogate any power to award such costs when the court above has refused to award them.

Section 2589 provides that the appellate court may award to the successful party the costs of an appeal, or may direct that costs shall abide the event of a new trial or of subsequent proceedings in the Surrogate's court, and that the costs may be made payable out of the estate, or fund or personally by the unsuccessful party, as directed by the appellate court; or if such a direction is not given, as directed by the Surrogate, which means not that if the appellate court fails to award appeal costs the Surrogate may award them, but if the appellate court does award costs and gives no direction whether the same shall be paid out of the estate or fund, or by the unsuccessful party, the Surrogate may exercise his discretion in the particulars wherein the appellate court has failed to exercise its own.

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MATTER OF PHALEN.

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The above case is, I think, directly in point. The circumstance that there was a jury trial directed to be had in the Court of Common Pleas by the General Term of the Supreme Court upon reversing the decree of the Surrogate, in no way helps the contention of the applicant. The jury trial mentioned in subd. 2 of § 2558 is the same referred to in § 2560, and that is a trial which the Surrogate may order with respect to a controverted question of fact arising upon a special proceeding for the disposition of real estate in pursuance of § 2547. Possibly the case where the Surrogate may grant a new trial by a jury upon a motion for the purpose made under § 2558 is also such a trial as is contemplated by the sections just mentioned.

To authorize the Surrogate, however, to award costs in either of these cases, there must, as required by subd. 2 aforesaid, be an absence of the direction specified in subdivision 1. The trial in the present case is not one which has been ordered by the Surrogate. He can, therefore, make no award of costs with respect to it.

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NEW YORK COUNTY.—HON. R. S. RANSOM, SURROGATE.—June, July, 1888.

## MATTER OF PHALEN.

*In the matter of the estate of JAMES PHALEN, deceased.*

A petitioner for the revocation of probate of decedent's will having omitted to include a legatee, named in the instrument, among those to whom the citation was directed (Code Civ. Pro., § 2649), the execu-

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tor, after the expiration of one year from the recording of the probate decree (§ 2648), and after the expiration of sixty days from the presentation of the petition for revocation, moved to dismiss the proceeding, on the ground of such omission. This motion having been granted, petitioner subsequently moved for a rehearing, which was denied, but the court allowed the petition to be amended so as to bring in the omitted party.

*Fountain v. Carter*, 2 *Dem.*, 313—distinguished.

MOTION to dismiss petition for revocation of probate of decedent's will, on the ground of failure to make a legatee, named in the will, a party to the special proceeding.

STEWART & SHELDON, for *Edgar Lockwood, executor, and U. S. Trust Co., trustee.*

CHAS. H. WOODRUFF, for *C. J. Phalen, petitioner.*

THE SURROGATE.—It is only necessary, for the purpose of deciding this motion, to consider one proposition. The petition for revocation of probate omits one party necessary to be brought in under the Code—namely, the petitioner's own wife, who is named in the will as a legatee. It is now too late to remedy this defect. Although the case presented by the petitioner for revocation on this application appeals strongly to the sympathy of the court, still the jurisdiction in this regard being purely statutory, nothing remains but to dismiss the petition (see 2 *Dem.*, 313; 95 *N. Y.*, 256; 1 *Dem.*, 387).

THE petitioner for revocation of probate having made a motion for a rehearing of the application to dismiss his proceedings, which was denied, asked leave to amend the petition by bringing in the uncited

## MATTER OF PHALEN.

party,— which was granted on July 12th, 1888, the following opinion being given :

THE SURROGATE.—This is an application to amend the petition heretofore filed herein, and being a proceeding to revoke the probate of the will of decedent, is objected to on the ground that a new party cannot be brought in after the period limited for the commencement of the proceeding has expired. The will was admitted to probate on the 8th day of April, 1887, and the petition for revocation was filed April 5th, 1888, and citation issued thereon, returnable May 31st, 1888. The petition filed herein has initiated this proceeding (Matter of Gouraud, 95 *N. Y.*, 256). Section 2517 Code of Civil Procedure, which was the subject of consideration in the case of *Fountain v. Carter* (2 *Dem.*, 313), I regard as inapplicable in the particular in which it requires the service of the citation within sixty days, as herein mentioned. That requirement I consider as entirely confined to the cases of persons who have actually been made parties to the proceeding, and to whom the citation has been issued. The person omitted here is not such a party. I shall, therefore, grant the prayer of petitioner.

[NOTE.—The history of § 2517 of the Code of Civil Procedure is of interest.

Section 74 of the (old) CODE OF PROCEDURE declared : “ *Civil actions can only be commenced within the periods prescribed in this title,*” etc. The caption of the Title, in which that section occurred, was : “ *Time of commencing civil actions.*” In nearly every

section, from § 73 to § 98 (the old statute of limitations), occurred a phrase, involving the words "action" and "commence," and which was employed in declaring the *time* within which such *commencement* must be effected.

Thus the inquiry inevitably arose—"when is an *action* deemed to have been *commenced*, so as to stop the running of the statute of limitations?" or "what is the *commencement* of an *action*, within the meaning of the foregoing provisions *limiting the time* for the *commencement* thereof?" The answer to this inquiry, which was twofold or in the alternative, was contained in the same title, and embodied in the two sentences of § 99, viz.: (1) "An *action* is *commenced* as to each defendant when the summons is served on him," etc.; and (2) "An attempt to *commence* an *action* is deemed equivalent to the *commencement* thereof, *within the meaning of this title*, when the summons is delivered . . . . to the sheriff," etc.

The commissioners to revise the statutes, appointed in 1870, reproduced in substance these provisions in the Code of Civil Procedure. In chapter 4 (the present statute of limitations), section 380 declares: "The following *actions* must be *commenced* within the following periods," etc.; section 388 provides that an *action* not elsewhere limited *must be commenced* within ten years; and the words "action" and "commence," as in the former Code, occur repeatedly in the chapter. Hence the same inquiry arises here, as above noted in the former statute; and the answer is contained in §§ 398 and 399 of the present Code,

which are reproductions of the two sentences of the old section 99 (*supra*).

Section 398 says: "An *action* is commenced against a defendant, WITHIN THE MEANING OF ANY PROVISION OF THIS ACT WHICH LIMITS THE TIME FOR COMMENCING AN ACTION, when the summons is served on him," etc.; and section 399 says: "An attempt to *commence* an *action*, in a court of record, is equivalent to the commencement thereof, WITHIN THE MEANING OF EACH PROVISION OF THIS ACT WHICH LIMITS THE TIME FOR COMMENCING AN ACTION, when the summons is delivered. . . . to the sheriff," etc. That is to say, the running of the statute, upon an accrued cause of action, may be stopped in either of two ways, viz.: (1) *commencing* an action, in the ordinary sense of the term, to wit, by service of process; or (2) by a sort of constructive *commencement*, or attempt to *commence*—consisting of a delivery of process to the sheriff.

The point urged is that the only *raison d'être* of § 399 is the assumed existence of other sections, in the Code (such as § 380, *supra*), which say in so many words: "an *action* for such or such a purpose, must be commenced *within* such or such a *time*;" the whole gist of the section (399) being its *reference* to the words "commencement of an action," occurring in the other sections, and the *permission* which it contains to translate *those words* in the liberal manner above described.

In framing § 399, the commissioners added a clause requiring a plaintiff, who desires to make a delivery of the summons to a sheriff equivalent to a commence-

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ment of the action, to serve, or commence advertisement against, his defendant within sixty days, etc. (see Throop's annotated Code, § 399, note). Thus far, as regards actions.

Next, as to special proceedings. The old Code had little to say on this subject. After startling the reader by announcing (§§ 2, 3) that "an action is an ordinary proceeding," while "every other remedy is a special proceeding,"—that is to say, the distinction between an *action* and a *special proceeding* is, that the former is "ordinary," and the latter extraordinary (which is equally untrue and absurd)—it proceeded to expend all its reforming energy on the newly created "civil action," and left the laws regulating the numerous special proceedings scattered through the revised statutes and the session laws, uncollated and unrevised.

It was an essential feature of the plan of the Commissioners of 1870, to bring this latter mass of statutory regulations into the Procedure act, unify the practice therein, and assimilate it, where feasible, to the practice in civil actions. Probably no branch of practice was more confused, uncertain and diverse in the source of its regulations, than that appertaining to Surrogates' courts; and more labor was expended on chapter 18 than on any equal bulk of matter in any other part of the Code. Every remedy which can be invoked in those courts is a special proceeding. A new provision was inserted (§ 2516), establishing the rule that the uniform mode of commencement is by "the service of a citation." In analogy to § 399, a new section (§ 2517) was inserted, providing that "The presenta-

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tion of a petition is deemed the commencement of a special proceeding, *within the meaning of any provision of this act which limits the time for the commencement thereof.*"

Here the presentation of the petition is the equivalent of the delivery of the summons to the sheriff in an action; and a like safeguard was added, that, in order to entitle a petitioner thus to *translate* the words of any section, which required him to "*commence a special proceeding*" within a specified time, he must serve, or begin advertisement against, a respondent within sixty days, etc.

It was, doubtless, a part of the plan of the Revision, that there should be found, scattered through chapter 18, provisions identical with § 380, declaring *within what time* various special proceedings "*must be commenced*"; upon which sections, accordingly, section 2517 would operate by way of reference. But in the many re-castings, additions and emendations to which the chapter was subjected, from the time of the Commissioners' First Draft, to September 1st, 1880, when the chapter became law, such sections or expressions, if any, disappeared, and section 2517

Jacet (ingens) litore truncus,  
Avulsumque humeris caput, et sine nomine corpus!

From one end of the chapter to the other, no section containing the language: "A special proceeding for (a purpose stated) must be *commenced* within (a time specified),"—"the meaning of" *which language* it is the sole function of § 2517 to explain,—occurs.

It was not to be wondered that the courts, in *Pryer v. Clapp* (1 *Dem.*, 387), and *Fountain v. Carter* (2 *id.*,



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313), proceeded upon the reasonable and generous assumption that this section meant something, and accordingly enlisted it in the service of explaining "the meaning of" § 2648, wherein is absolutely nothing to be explained. The latter section requires a person seeking revocation of probate of a will to present his petition within a year from the probate. If he *does this*, he need pay no further attention to time limitations; if he *fails to do this*, his remedy is barred. To assume or announce that § 2648 is a provision "which limits the time for the commencement of a special proceeding," within the meaning of § 2517, and thus subject the petitioner under the former section to the necessity of observing the sixty days' clause of the latter, or lose his remedy, is the result of a confusion of ideas. Judge EARL shows, in 95 *N. Y.*, on pages 261, 262, that under § 2648, a party who has *presented his petition* within the year specified—which is all that he is directed to do—need not do something else in order to save his remedy; also that, when the petition has been filed, the court has enough power, in respect of forcing the proceeding to a conclusion, to obviate the direful results, depicted in 28 *Hun*, on page 563, arising from waiting "ten years before suing out a citation."

We thus arrive at a conclusion not only consistent with, but necessarily involved in the *dictum* in Matter of Gouraud (95 *N. Y.*, *supra*),—that § 2517 and § 2648 have no relation to each other.—REP.]

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MATTER OF HAIG.

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NEW YORK COUNTY.—HON. R. S. RANSOM, SURROGATE.—July, 1888.

MATTER OF HAIG.

*In the matter of the estate of DAVID HAIG, deceased.*

The petition, in a special proceeding instituted to dispose of the real property of a decedent for the payment of debts, need not show the date of issuance of letters (Code Civ. Pro., § 2750); nor is it essential to allege that the property is not "subject to a valid power of sale for the payment" of debts or funeral expenses.

The purchaser on a sale, in such a special proceeding, acquiring, under § 2778, the interest of the decedent existing at the time of his death, the proceedings are not affected by the happening, *pendente lite*, of an event whereby the interest of the decedent's estate becomes augmented.

The holder of a mortgage upon the property, existing when decedent took title, who was not a creditor at the time of the death of the latter, is not a necessary party.

HEARING of objections to regularity of proceedings instituted to dispose of real property of decedent. The facts appear in the opinion.

THE SURROGATE.—This proceeding was brought by the executor of the will of the decedent for the disposition of his real estate for the payment of his debts. It is claimed, in behalf of certain of the parties interested in such real estate, that the proceedings are defective in certain particulars, which I proceed to consider and dispose of as follows:

1. The claim that the petition is defective by reason of its omission to state when the letters testamentary

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MATTER OF HAIG.

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were issued is unfounded. While failing to show the precise date of their issuance, the petition avers their issuance, and states facts showing that the present proceeding was commenced within three years after they were issued. This is sufficient (Code Civ. Pro., § 2750).

2. The will of the decedent shows that the property sought to be disposed of is not subject to a valid power of sale for the payment of the debts or funeral expenses, and there is nothing in the law that requires the petition to contain an allegation of this fact (*id.*, 2752).

3. Thomas Haig, the brother of the decedent, who was a party to this proceeding, and is referred to in the petition as one of his heirs, and as a person upon whose death, without issue, the decedent would have become entitled to an additional interest in certain of the real estate in the petition mentioned, has died since the commencement of the proceeding. It is alleged, and not disputed, that his heirs are parties thereto. The statute (Code Civ. Pro. § 2778), recognizes the power of the court to vest in a purchaser such interest in the estate disposed of as the decedent had at the time of his death, and makes no provision with respect to the disposition of any estate or interest subsequently acquired. It is, therefore, unnecessary to inquire whether or not such interest or estate has been so acquired. The death of the decedent's brother has, therefore, no effect on the regularity of this proceeding.

4. The objection to the omission to make a party to the proceeding the holder of a mortgage upon the

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MATTER OF HAVENS.

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property is of no effect. It does not appear that such holder was a creditor of the decedent at the time of his death, and the allegations of the petition negative the notion that he was. It is stated on behalf of the petitioner, and not denied by the contestants, that the mortgage was a lien upon the property when acquired by the decedent and the other parties in interest. Any disposition which may be made of such property under the decree which shall be entered herein, would be subject to the lien of the mortgage. The holder is an unnecessary party hereto.

The petitioner is entitled to a decree.

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NEW YORK COUNTY.—HON. R. S. RANSOM, SURROGATE.—July, 1888.

## MATTER OF HAVENS.

*In the matter of the probate of the will of CHARLES G. HAVENS, deceased.*

The will of testator, after a clause disposing of his residuary estate for the benefit of a society named, declared that, in case, for any cause, such clause should fail to take effect, so as to pass all or any part of such estate to or for the use of the society, he gave the same to A. and others named, and the survivors of them, "absolutely and in fee"; adding: "And this devise and bequest is in the confident belief that they will apply my estate and property so vesting in them in accordance with *my wishes*, but it is intended to be unconditional and free from any legal trust or obligation qualifying their absolute title." The evidence in the probate proceedings failed to disclose any intent

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MATTER OF HAVENS.

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on testator's part to exact, or agreement by A., etc., to yield compliance with the wishes indicated.—

*Held*, that the substituted disposition was valid, the legatees thereunder taking absolutely; and that a judicial construction of the prior clause was unnecessary.

CONSTRUCTION of testamentary disposition of personal property, pursuant to Code Civ. Pro., § 2624.

THE SURROGATE.—A decree is about to be entered admitting to probate the will of the decedent, after an unsuccessful contest thereof by his heirs at law and next of kin. The latter, availing themselves of the right secured to them by § 2624 of the Code of Civil Procedure, have put in issue and raised a question as to the validity of certain dispositions of personal property contained in the will. These are found in its 20th and 21st clauses.

The conclusion which I have come to respecting the 21st clause renders unnecessary the consideration of the question of the validity of the 20th clause.

The 21st clause is as follows: "In case by disability of the beneficiary or from other cause the last preceding clause or item should fail to take effect so as to pass, to or to the use of the said Havens Relief Fund Society, my residuary estate, or the proceeds thereof, or all or any part or parts of the same, I give, devise and bequeath said residuary estate and any and every part thereof which shall fail to be actually applied to the purposes indicated in the last preceding item of my will, unto the persons named and who first qualify as my executors and John D. Jones and William H. H. Moore and the survivors and survivor of them absolutely and in fee. And this devise and

## MATTER OF HAVENS.

bequest is in the confident belief that they will apply my estate and property so vesting in them in accordance with my wishes, but it is intended to be unconditional and free from any legal trust or obligation qualifying their absolute title."

It is claimed by the contestants that this provision, when taken by itself or considered in the light of the evidence which has been submitted respecting it, is to be regarded as an attempt on the part of the testator, in the contingency mentioned by him and through the instrumentality of persons upon whom he has imposed a trust for the purpose, to make an illegal disposition of his residuary estate.

I have carefully considered the evidence and am unable to find therefrom that there was any such agreement or understanding, express or implied, on the part of any of the persons mentioned or referred to in the clause under consideration, or any such attitude or conduct on the part of any of them as would justify the conclusion that the testator intended to exact, or they intended to regard as an obligation absolutely binding on them compliance with such wish as the testator had expressed in his will or otherwise as to the disposition by them of the property left them.

The evidence adduced practically leaves the solution of the question raised by the contestants to rest, almost, if not entirely, upon the language used in this clause. That language, taken in connection with the evidence, shows at most the existence of a belief and expectation on the part of the testator, that his residuary estate would be devoted to the purposes of the

## MATTER OF HAVENS.

charity which is referred to in the 20th clause of the will, by the persons to whom he bequeathed it absolutely, but whom he advisedly and expressly left free to so devote it, or to retain or use it for their own personal benefit.

This the law recognizes the right of a testator to do (Rowbotham v. Dunnett, *L. R.*, 8 *Ch. Div.*, 430; Bowker v. Wells, 2 *How. Pr.*, *N. S.*, 150; Lynch v. Loretta, 4 *Dem.*, 318; Riker v. Cromwell, 7 *N. Y. S. R.*, 316; Manice v. Manice, 43 *N. Y.*, 388; Gilbert v. Chapin, 19 *Conn.*, 347; Harper v. Phelps, 21 *id.*, 270; Hood v. Ogländer, 34 *L. J.*, *Ch.*, 531; Pennock's Appeal, 20 *Penn. R.*, 277; The Mayor v. Wood, 3 *Hare*, 142, Foose v. Whitmore, 82 *N. Y.*, 406; Lawrence v. Cooke, 104 *N. Y.*, 638; Cases cited in Lawrence v. Cooke, 32 *Hun*, 126; Cases cited in Willets v. Willets, 35 *Hun*, 401).

The cases which have been submitted in opposition to the conclusion which I have reached have no application here, and are differentiated from the authorities above cited in the important and controlling particular that in them the language of the will, or the action or attitude of the partly ostensibly benefited by it, was of such a nature as to impose upon him a trust with respect to the property bequeathed (Matter of O'Hara, 95 *N. Y.*, 403; Willets v. Willets, 103 *N. Y.*, 650; Russell v. Jackson, 10 *Hare*, 204; Jones v. Badley, *L. R.*, 3 *Eq.*, 635; Lefevre v. Lefevre, 2 *T. & C.*, 341).

The result which I have reached confirms the views which I expressed upon the hearing concerning this subject. It precludes the next of kin of the testator

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from raising, and relieves me from the necessity of considering, the question as to the validity of the 20th clause of the will.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—July, 1888.

## ESTATE OF MASTERTON.

*In the matter of the estate of MARY MASTERTON, deceased.*

An answer, interposed under Code Civ. Pro., § 2710, in a special proceeding instituted to discover property of a decedent withheld, etc., though inartificially and discursively drawn, may entitle the respondent to a dismissal of the proceedings, if the court is able to infer allegations of fact showing ownership, or title to the possession, of the property.

A PETITION was presented on behalf of Robert F. Todd, executor of decedent's will, alleging, among other things, that John A. Todd has in his possession certain savings-bank pass-books of the deceased, and of which she was the owner and holder at the time of her death, and which he withholds from the petitioner; and praying an inquiry concerning the same, and that said John A. Todd might be cited to attend and be examined on the subject.

The citation was issued accordingly, and the person cited subsequently filed an answer, duly verified, as follows :



## ESTATE OF MASTERTON.

"John A. Todd, for answer to the order of the Surrogate of Westchester county, says: 1st, That he has in his possession, upon which there appears the name of Mary A. Masterton, three bank books, as follows: No. 29,588 and No. 107,437 of the Manhattan Savings Institution of New York city; and No. 152,074 of the Emigrant Industrial Savings Bank of New York city; that beside these bank books there are a few relics or keepsakes of small value, and that the amount of money that appears to be due upon those books is about \$1,000.

2d, He further shows to the court, that the said Mary A. Masterton was a sister of Caroline Masterton, and that the said Mary died first, leaving, as appears by the decision of this court, a last will, which has been probated; that after Mary's death, the said Caroline administered upon Mary's estate, and died in ignorance that Mary had ever made a will.

3d, That Caroline left an instrument in writing, purporting to be a will and which deponent believes was a will, and which is now in the Surrogate's court for probate.

4th, That for about two years before Caroline's death this deponent acted under a power of attorney for the said Caroline Masterton, and collected her interest and rents, and in that way became possessed of these bank books.

5th, That under the will of Caroline he is a legatee in his own right, and inherits a legacy which was devised by the terms of said will to William Todd, who is a deceased son of your deponent, and that he is the executor named in the said will of Caroline.

## ESTATE OF MASTERTON.

6th, That since 1885 he has had charge of the joint property of the two estates, that he has collected rents, paid taxes, attended to insurance, made repairs, gone to New York to consult Caroline when she was sick, and has expended money for these joint estates, for no part of which has he ever received so much as one cent for compensation.

7th, He further shows to the court that, as he is informed and believes, there are bills more than enough to entirely use the money on those bank books.

8th, That Caroline and himself expended money upon what now proves to be partly Mary's property, but which was not known to either at the time to be such, and which money will, at least half of it, have to be returned to Caroline's estate.

9th. The costs of Mary's sickness, doctor's bills and funeral expenses were paid wholly by Caroline while unconscious of there being two estates, and should be refunded to Caroline's estate.

10th, Mary's will gives Carrie, as I understand it, the use and income of her property, and more than that, it gives her enough to live on, and if the use and income was not sufficient for her support, that she could use the principal; and under that construction there is a large amount of money which is now due to Caroline's by Mary's estate.

11th, That another reason why this court should not make its order directing me to turn over these books is, that as I am informed and believe, the executor of Mary Masterton is entirely irresponsible.

12th, That the equities in his own favor, and as possible executor of Caroline's estate are, as he be-

## ESTATE OF MASTERTON.

lieves, so strong, that this court will not issue its order against him, and he is advised that the foregoing facts are not those contemplated by § 2706, which is the provision of the Code under which the petitioner is moving.

Wherefore he prays that the petition be denied."

L. T. YALE, *for petitioner.*

J. S. MILLARD, *for John A. Todd.*

THE SURROGATE.—The answer to the petition is inartificially and discursively drawn, and without any apparent regard to the requirements of § 2710 of the Code, as amended in 1881. It is there provided that, if the person cited shall interpose a written answer, duly verified, that he is the owner of said property, or is entitled to the possession thereof by virtue of any lien thereon, or special property therein, the Surrogate shall dismiss the proceeding. I think it may fairly be considered that the person cited in this case states facts sufficient, in his answer, to show that he claims to be entitled to the possession of the property in question by virtue of a lien thereon for his commissions and services as agent for Caroline Masterton, and also by reason of a special property therein as the executor named in her will.

As the interest of an executor in the estate is derived, primarily, from the will, it vests in him from the moment of the testatrix's death. It so happens, in this instance, that the will of Caroline was admitted to probate pending this proceeding, and before the answer was filed. As the interest of John A. Todd in her estate became vested in him, as her executor, at

## ESTATE OF MASTERTON.

the time of her death, and as this property, or evidence of property, was in her possession at that time it would be improper for this court, in this proceeding, to order it to be delivered to the executor of Mary Masterton's will.

The case is somewhat complicated. Mary and Caroline were maiden sisters, residing together at Tarrytown, having joint interests in some, and several interests in other, property, with no heirs at law or next of kin nearer than cousins. Some years since, while on a visit to some of the relatives in Albany, Mary executed a will and left it in the hands of said Robert F. Todd, named therein as executor. She then rejoined her sister in Tarrytown, studiously concealing from her the fact of her having made a will, until she died in October, 1883. Caroline, finding no will of Mary, and believing her to have died intestate, took out letters of administration on her estate, and thus came into possession of these pass books and other property of Mary, and regarded herself as sole owner of the whole, after the payment of debts, etc.

As she, personally and through John A. Todd her agent, drew the interest on the amounts of the deposits in the savings banks, she must have filed with them certificates of the Surrogate that she was the duly appointed administratrix of Mary's estate, and the accounts are still, doubtless, to her credit as such. Caroline then died, in May, 1887, having previously made a will, which was then offered for probate, and about the same time the will of Mary also was presented for a like purpose. Both were contested, but admitted to probate. If the executor of Mary's will

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ESTATE OF MASTERTON.

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were to take these pass books to the banks with the Surrogate's certificate of his appointment, the banks would, probably, refuse to pay him funds which stand to the credit of Caroline as administratrix.

However that may be, as Caroline's estate vested in interest in the executor of her will, and as she claimed to be the owner of the deposits of which these pass books are the evidence and to the possession of which her executor claims the right, by reason of a special property therein, the present application must be dismissed, without prejudice to the petitioner's pursuing any other remedy open to him.

As Caroline dealt with the property left by Mary as her own, and as she may have made deposits in these banks which are credited on these same pass books, and as she may have withdrawn and used some of the funds for the benefit of the estate of Mary, it is obvious that whatever equities may exist, as between the two estates, cannot be adjusted in this proceeding.

Perhaps a proceeding under § 2606 may furnish a solution of the difficulty.

Proceeding dismissed.

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WILL OF UNDERHILL.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—August, 1888.

WILL OF UNDERHILL.

*In the matter of the probate of the will of EDWARD B.  
UNDERHILL, deceased.*

Testator's will, after devising a lot of ground to the town of Y., for the purpose of erecting a town hall thereon, bequeathed a sum of money toward such erection, "upon condition" that the town and people raise a sum specified, and apply it to the same purpose within three years from testator's death.—*Held*,

1. That the town had no power, under the R. S., to take the legacy.
2. That the disposition was void, as suspending the ownership of personal property for a period (of three years) which might exceed two lives in being.

Testator's will, after devising a lot of ground to the executors, in trust for the purpose of erecting a church edifice thereon for the use of any protestant Christian society which might first comply with certain conditions, bequeathed a sum of money to the executors, in trust, to apply the same toward such erection, "upon condition" that a specified sum, applicable to the like purpose, be paid to the treasurer of the society, within three years from testator's death.—

*Held*, that the bequest was void under the statute against perpetuities, and that the constitution of a trust did not prevent this result.

ON the occasion of the probate of the decedent's will, the court was asked to construe certain provisions of the same, in so far as they purport to dispose of personal property, and to determine the validity of such provisions. They were embraced in the fifteenth and sixteenth clauses.

The fifteenth clause devised a lot of ground to the town of Yorktown for the purpose of erecting thereon a town hall for the uses of the town, upon condition

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WILL OF UNDERHILL.

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that such building, particularly described, should be erected thereon within three years after the testator's decease, and then proceeded as follows: "And I further give and bequeath to said town of Yorktown the sum of three thousand dollars towards the erection of such town hall, upon the plot of ground above designated, provided, nevertheless, and this bequest and devise are upon condition that the said town of Yorktown and people shall raise the sum of fifteen hundred dollars and apply the same towards the erection and completion of such town hall, on such lot within three years after my decease."

The sixteenth clause gave and devised to the executors, in trust, a certain other lot, describing it, "for the purpose of erecting thereon a large, substantial and tasteful church, for the use of an Episcopalian, Presbyterian, Congregational, Baptist, or any other Christian society of the protestant faith, whichever may first comply with the conditions of this devise and bequest. And I also give and bequeath to my said executors, in trust, nevertheless, the sum of three thousand dollars, to be expended toward the erection of a church edifice upon the site and for the uses before specified. And I also give permission and right to such society to quarry granite or marble stone upon my land from either quarry then remaining unsold, to be used in the erection of the foundation or basement of such edifice, provided however, and the foregoing devise and bequest are hereby made upon the express condition, that within three years from the date of my decease, there shall have been first subscribed and paid in to its treasurer, by such society

## WILL OF UNDERHILL.

or its friends, for the purpose of the erection of such edifice, the sum of two thousand five hundred dollars, and if such sum, so subscribed and paid in and expended by such society, shall amount to the sum of three thousand dollars, or any sum in excess of said three thousand dollars, in such case the foregoing bequest of three thousand dollars shall be increased to the sum of three thousand five hundred dollars so to be paid by my executors."

The application for the construction of the will, in this regard, was made by Alfred M. Underhill, a residuary legatee named therein.

R. H. UNDERHILL, *for applicant.*

AB' M S. UNDERHILL, *for James Wood and others, executors.*

THE SURROGATE.—Two objections are raised to the validity of the provisions of the fifteenth clause, in so far as relates to the bequest: *First*, that the town has no capacity to take a legacy; and *second*, because the absolute ownership of the amount of such legacy is illegally suspended.

It is provided by 1 R. S., 337, § 1, that each town, as a body corporate, has capacity to sue and be sued, to purchase and hold lands within its own limits, and to purchase and hold such personal property, as may be necessary to the exercise of corporate or administrative powers. Section 2 provides that no town shall possess or exercise any corporate powers, except such as shall be enumerated in that chapter (chap. xi). There does not appear to be any power granted to a town, by statute, to receive such a legacy as the testator sought to bequeath.



## WILL OF UNDERHILL.

There can be no doubt that the second objection is well taken. There is an illegal suspension of the absolute ownership of the amount of the legacy, as it is not limited upon a life, but upon a period of, time. Our statute (1 R. S., 773, § 1) is explicit in declaring that the absolute ownership of the personal property shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance and until the termination of not more than two lives in being at the death of the testator.

To render such suspension valid, the bequest must be limited on a life or lives. It is difficult to conceive how a limitation of three years may not be longer than until the termination of the lives of any two beings in existence at the death of the testator. To render such future estates valid, they must be so limited that in every possible contingency, they will absolutely terminate at such period, or they will be held void. The authorities to this effect are abundant. It will be sufficient to cite Lewis on Perpetuities, 170; Hawley v. James (16 Wend., 62); Schettler v. Smith (41 N. Y., 334); Smith v. Edwards (88 *id.*, 92).

The legacy attempted to be given to aid in the erection of a church edifice, must be declared void, on the same ground. That a trust was created in regard to it, can make no difference (Smith v. Edwards, *supra*).

The result is that the sums, so attempted to be bequeathed, fall into the *residuum* provided for in the will.

Decree accordingly.

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MATTER OF LEINKAUF.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—September, 1888.

## MATTER OF LEINKAUF.

*In the matter of the judicial settlement of the account  
of HERMAN J. LEINKAUF, and others, as execu-  
tors of the will of DONAH LEINKAUF, deceased.*

The will of testatrix directed the residue of her estate to be divided into seven equal shares, for the benefit of her three sons and four daughters. Each son's share was to be invested in the executors' names; the income of the share of the only adult son to be paid to him until he should arrive at the age of thirty years, and then the principal; the income of the infant sons' shares to be paid to their guardians until their majority, thereafter to the sons until arriving at the age of thirty years, when they should receive the principal. Similar provisions were made in favor of the daughters.

In case of the death of a son, without issue, before receiving the whole of his principal, the unpaid portion thereof was to "revert to and form part of the residuary estate, to be divided into shares for the surviving children, as aforesaid." A son having died after reaching majority but under the age of thirty years, without issue,—

*Held*, that the principal of his share must be held and invested, and the income applied, by the executors, to the benefit of the surviving children, as if the deceased son had never existed, except the proportion falling to a son who had passed the age of thirty years, which should be paid to him at once.

ON the judicial settlement of the accounts of the executors, a question involving the construction of the will of the testatrix, was submitted to the court, which is sufficiently stated in the opinion.

J. H. K. BLAUVELT, *for the executors.*

WM. BERNARD, *special guardian.*

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MATTER OF LEINKAUF.

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**THE SURROGATE.**—All that seems to be necessary in this matter is, to ascertain the meaning and intention of the testatrix, as expressed in her will. She was twice married, her first husband's name being Cohen. After making provision for her last husband, she disposed of the residue of her estate by directing it to be divided into seven equal shares for her then seven children, of whom three were sons, and four, daughters, all of whom were minors, with one exception. Each son's share she directed to be invested on bond and mortgage on sufficient real estate, in the executors' names, the interest or income arising therefrom to be paid to her son Samuel M. Cohen, who was of age, until he should arrive at the age of thirty years, when he was to be paid the principal of his share. The income of the shares of the sons, who were minors, was to be paid to their respective guardians, for their support and education, until they should severally arrive at the age of twenty-one years, when the income was to be paid to them personally; and when they respectively attained the age of thirty years, each one's principal was to be paid to him. The executors were also authorized, in their discretion, to make advances to the sons, out of their respective shares, after they had attained the age of twenty-five years, provided that such advances should not exceed one half of each share.

The shares of the girls were to be invested in like manner and the income to be applied to support and education, until they were respectively married, or became twenty-one, when it was to be paid to them for life, with remainder to their issue; and in case of

## MATTER OF LEINKAUF.

death without issue, the share of the one so dying was given to the surviving children, in equal proportions.

Then, by a subsequent clause, it was provided that "in case of the death of any or either of my sons before he or they shall have received the whole of his or their share or shares, such share or shares of said deceased son or sons, or the remainder thereof, as the case may be, shall, immediately on such decease, be paid over to the lawful issue of said son or sons, in equal proportions, share and share alike. Should such deceased son or sons leave no lawful issue, then such share or shares shall revert to and form part of my residuary estate, to be divided into shares for the benefit of my surviving children as aforesaid."

A provision was also made for letting in any after-born children to share in the residuum, in the same manner and under the same restrictions as given to the children then living. She had such after-born children.

One of the sons has died, pending the administration of the estate, at the age of twenty-five years and upwards, but under thirty, and without issue. The question is, are the surviving brothers and sisters now entitled to his share, or what may remain of it, being about \$980, in possession, or must it still be held by the executors? It seems very clear, and it is so held, that, in the very language of the will, his "share shall revert to and form part of the residuary estate, to be divided into shares, for the benefit of my surviving children, *as aforesaid*." It now forms a part thereof, henceforth, just as if he never had existed, and must be held by the executors, be invested by

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MATTER OF RIDER.

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them, the income applied, and the other sons' shares thereof be paid over to them on their attaining the specified age, except the share of Samuel M. Cohen, who, being over thirty years old, is entitled to his, at once.

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CHAUTAUQUA COUNTY.—HON. DANIEL SHERMAN,  
SURROGATE.—September, 1888.

## MATTER OF RIDER.

*In the matter of the estate of NATHANIEL T. RIDER,  
deceased.*

The decedent, in 1862, entered into an oral agreement with his niece, H., and her husband, J., whereby all were to occupy and use, in common, the farm, and personal property thereon, of decedent, during his life,—he to be supported by them until his death, when the farm, and what remained of the personalty, were to be theirs.

Upon an application for a decree disposing of decedent's real property, for payment of a debt alleged to be due to the petitioner, C., it appeared that, between 1878 and 1881, decedent had resided with and been maintained and cared for by petitioner, his sister, in consequence of the failure of H. and J. fully to carry out their agreement; and that he had died in 1882, leaving a will wherein he recited this agreement, and devised the farm to H., for life, remainder to her children, and nominated her sole executrix. It was contended that decedent was not seized of the farm, at the time of his death.—

*But*, on a jury trial, the verdict was in favor of petitioner, and a new trial was refused.

APPLICATION, by Bersheba Chipman, a creditor, for decree directing the disposition of decedent's real property, for payment of debt.

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MATTER OF RIDER.

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C. F. CHAPMAN, *for petitioner.*

ORRED EDSON, *for objectors.*

THE SURROGATE.—This is a motion for a new trial upon the question of fact, tried in the county court, before Hon. J. S. Lambert, county judge, and a jury, as to whether or not the decedent died seized of certain land which the petitioner, a creditor, seeks to sell in this court under §§ 2749 and 2750 of the Code, for payment of debts. The jury found the title of the land in the decedent at his death, and the contestants, legatees under the will, now move for a new trial in this court, upon the grounds that the verdict was against evidence, and of alleged error in the charge of the county judge to the jury.

The petitioner's claim as a creditor was based upon a judgment recovered by her in the county court, September 25th, 1884, against Emily Hunt, as executrix of the last will of the deceased for the sum of \$401.21, and \$186.50 costs. The action was contested by the executrix, and tried upon the merits before W. O. Benedict, Esq., as referee. The petitioner's claim as such creditor was for services performed by her for said Nathaniel T. Rider who was her brother, in his lifetime, during the years 1878, 1879, 1880, and 1881, in boarding and lodging him and in washing, mending, and making clothes for him in said years.

The deceased died July 6th, 1882. He made his will, dated June 20th, 1882, which was probated November 14th of the same year, as a will of real and personal estate. His will contained the following

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MATTER OF RIDER.

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recital: "Whereas, I have lived with and had my support and maintenance with Judah B. Hunt and Emily Hunt his wife (who is my niece), for many years past, with the understanding that they should have my real estate at my decease, now therefore, in consideration thereof and for the regard I bear for them;" and then, by such will, he devised his real estate to his said niece Emily Hunt, during her life, and at her death to George W., Warren M., and Grant A. Hunt, children of said Emily and Judah B. Hunt, and appointed his said niece Emily Hunt sole executrix. In her verified petition for the probate of the will, she alleged that the deceased died possessed of real and personal property in Chautauqua county, and that such personal property did not exceed in value \$150, and his real property \$1,800.

The evidence on the trial showed that the said Nathaniel T Rider, being the owner, in 1862, of an improved farm of 50 acres, and of some stock and farming tools thereon, made a verbal agreement with his said niece, Emily Hunt, and her husband, Judah B. Hunt, to the effect, that they should move upon his farm, and he live with them and be clothed and supported by them during his natural life, they working the farm and having the avails thereof with him, all living together as one family, without any particular agreement as to either having the exclusive possession thereof, and all using in common the personal property of each, and the products of the farm for their mutual support and maintenance, and that, at the death of said Rider, the said Emily Hunt or she and said Judah B. Hunt her husband were to have

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the farm, as their own, and the personal property of the deceased then remaining: That such agreement was substantially carried into effect and executed by the said parties thereto, except as hereinafter stated: The said Hunts went on to said farm taking with them, their stock, farming tools, and household furniture, all of the value of about \$200, and all living in the same house and having the use and possession in common of the said farm and of said personal property and of the stock and farming tools belonging to said Rider, which were of the value of about \$100, and together erected a barn upon the farm, and made other permanent improvements thereon: That, soon after the death of the said testator in 1882, the said Emily Hunt, executrix, caused an inventory to be taken of the personal property owned by the testator at his death on said farm, and which had been so used in common thereon, and which property in said inventory was appraised as of the value of \$99, being insufficient to pay the debts, funeral expenses and expenses of administration of the estate of deceased: The debts owing by the testator at his death consisted of a doctor's bill, and other little claims, amounting in all to \$42.05, which have been paid, excepting said claim of the petitioner, of \$401.21.

The evidence further showed that, during some parts of the years 1878, 1879, 1880 and 1881, the said Nathaniel T. Rider did not reside with said Hunts upon the farm, and was not wholly supported by said Emily and Judah B. Hunt, but lived with and was boarded, clothed and supported by his sister, the petitioner, Bersheba Chipman, for which she holds a



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valid claim against the estate of the deceased now due, of said \$401.21 with interest from September 25th, 1884, for the payment of which this proceeding was instituted.

The evidence also showed that the testator was, at his death, residing on said farm and being supported by the said Emily Hunt and Judah B. Hunt in the same manner as prior thereto, under the verbal agreement made between them, as above stated, in 1862.

The facts as proved show the claim of the petitioner, Bersheba Chipman, for the support of the testator, to be equitable and just as against this estate, and as against the claims of said Hunts thereto, under the agreement of 1862, and said will. There was evidence given, tending to show that the testator was in possession of this land and the owner of it at his death. By his will he gave the use of it to Emily Hunt during life, and thereafter in fee to her three children above named, thereby wholly ignoring the claims of her husband, Judah B. Hunt, under the verbal agreement of 1862, and also, in part, the claims of said Emily under the same agreement.

The learned counsel for the contestants strongly claims that the county judge erred in refusing to charge the jury that, if they were satisfied from the evidence that said Emily and Judah B. Hunt were by the agreement to have the real estate in question at the death of Nathaniel T. Rider, and they had fulfilled said agreement, that then the said Nathaniel T. was not seized of said land at his death and the interrogatory should be answered "No." The county judge declined to charge on that subject other than he had

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charged, stating that he had charged the jury on that proposition as favorably to the contestants as the evidence would justify; and the contestants excepted.

I think that the case shows that the learned judge had charged as so requested, in charging substantially that, if the jury found that the contestants went into possession of this land under an agreement to support Rider during his life and had improved the land as claimed, and had fulfilled their agreement, then they would answer the question "No."

In other parts of his charge, the county judge mentioned—possession of 20 years of the land, but his attention was not particularly called to that part of his charge, and no specific objection or exception was taken thereto. In my opinion, no error was committed to justify the granting of a new trial in this matter, and the motion, therefore, is denied.

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MADISON COUNTY.—HON. A. D. KENNEDY, SURROGATE.—October, 1888.

## WILL OF CRUMB.

*In the matter of the probate of the will of JOSEPH H. CRUMB, deceased.*

A Surrogate's court, being invested with general jurisdiction to take proof of wills, must exercise the same in the manner pointed out by statute, provided that the legislature has prescribed a certain mode of procedure; but where the manner in which the court may proceed to obtain

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jurisdiction of a party necessary to the probate of a will is not designated by statute, an incidental power exists to adopt such practice as will best accomplish the required ends, including the protection of the legal rights of all persons interested.

After decedent's will had been admitted to probate, and letters testamentary issued to the executrix therein nominated, the latter discovered the existence of an heir and next of kin of decedent, who had not been cited to attend the probate. Thereupon, the court, in the absence of specific statutory direction as to the mode of procedure, issued a citation to the heir, to attend the probate and show cause why the proceedings had should not stand and be confirmed.

It is not absolutely requisite to the valid execution of a will, in all cases, that the instrument should be read to or by the testator. It is enough that the court be satisfied by competent and trustworthy evidence that the testator understood and approved all its provisions. So—

*Held*, where it appeared that decedent had given specific directions to the draftsman, as to the contents of the will, of which the latter made a memorandum in decedent's presence, which memorandum was produced on the hearing and corroborated the testimony of the draftsman, that the instructions had been strictly followed.

Campbell v. Logan, 2 *Bradf.*, 90—followed.

Worthington v. Kleim, 144 *Mass.*, 167—approved.

CITATION to show cause why decree admitting decedent's will to probate should not stand, and why respondent should not be bound thereby, as if he had been cited upon the application for probate.

The facts are stated in the opinion.

W. E. BURDICK, and O. U. KELLOGG, *for proponent*.

MASON & CUSHMAN, *for contestant*.

THE SURROGATE.—The testator, Joseph H. Crumb, died in the town of DeRuyter, Madison county, N. Y., May 21st, 1887. He left a will executed by him May 6th, 1884, in and by which he gave all his property, amounting to \$75,000, to his wife, and appointed her the sole executrix of his will. He left no children surviving him, and, at the time the executrix filed

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her petition for probate of the will, it was supposed by her that he left no heir at law or next of kin, except J. Hamilton Crumb, a half brother, residing in the State of Ohio. The will was admitted to probate July 18th, 1887.

Some months after the probate of the will, she learned of the existence of one Sidney Crumb, a son of a deceased half brother, who should have been cited to attend the probate of the will. For the purpose of curing any defect there might have been in the proceeding to prove the will, by reason of the omission to serve a citation upon Sidney Crumb, the executrix filed a petition in this court on February 21st, 1888, setting forth the proceedings that had been had in the Surrogate's court to prove her husband's will, and alleging the existence of this newly discovered heir at law and next of kin, whereupon a citation was issued to said Sidney Crumb, returnable April 7th, 1888, to attend the probate of the will of said testator and to show cause, if any be had, why the evidence taken, and the proceedings theretofore had to prove the will should not stand, and why the decree admitting said will to probate and adjudging the same to be a valid will to pass real and personal estate should not be sustained, and why he should not be bound thereby, with the same force and effect as if he had been previously cited to attend the original probate thereof.

The Code has made no provision for such a contingency as above referred to, and no precedent could be found, to aid the court in determining what the practice should be under such circumstances in a Sur-

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rogate's court, but we think there can be no doubt of the correctness of the practice in this case for the following reason: The Surrogate has general jurisdiction to take proof of wills and to admit them to probate. This must be done in the manner pointed out by statute, provided the legislature has prescribed a certain mode of procedure but when it has failed to designate the manner in which the court may proceed to obtain jurisdiction of a person necessary to the probate of a will, the court, among its undefined and incidental powers, has the legal right to adopt such a mode of practice as will best accomplish such a result and fully protect the legal rights of all persons interested in the proceedings. In *Campbell v. Logan* (2 *Bradf.*, 90), the court makes use of an expression which clearly states the ground that justifies the action of the Surrogate in this matter and is as follows: "The power to take the proof of will being given generally, the mode of its exercise in a case not provided for by statute, must be regulated by the court in the exercise of a sound discretion according to the peculiar circumstances of each particular case."

By service of a citation upon Sidney Crumb in the manner and form adopted in this case, he was fully apprised of his relations to this proceeding, and upon the return thereof, he appeared by his attorneys and filed his objections to the probate of the will, and thereupon a trial was had the same in all respects as if he had been cited in the original proceeding to prove the will. Possibly some other mode of practice may have been as well or better, but by pursuing the course we have stated, the former decree of the court,

## WILL OF CRUMB.

admitting the will to probate, remained undisturbed and unrevoked, and all acts of the executrix remained in full force and effect while every legal right of the contestant was preserved to him.

Having stated the manner in which the contestant was made a party to these proceedings, it is now our duty to determine the questions at issue.

We shall hold that the will in question was duly and legally executed; that, at the time of its execution, Joseph H. Crumb was not under the undue influence or restraint of his wife or any other person; and that he was of sound, disposing mind and memory, and competent to make his last will and testament.

These findings cover all the objections of the contestant, and we might refrain from the discussion of any question arising from the facts proven in this case and upon which the contestant relies to reject the will, but we think it due to the respective counsel that we should state some of the reasons which lead us to the conclusion that the will must be admitted to probate. In so doing, however, we shall confine the discussion to this single proposition, to wit: Is it necessary to the valid execution of a will that it should be read by or to the testator before its execution by him.

The testator, at the time of his death, was sixty years of age. He had been an active and successful business man in the town of DeRuyter, a man who stood high in the estimation of his acquaintances, and who had, for many years, been one of the prominent and influential men of his town, a man well informed, of excellent judgment, a man trained in the methods

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of business, accustomed to execute papers involving large transactions, whose opinion in regard to business affairs was frequently sought and respected by his neighbors, a man whose integrity was unquestioned, and whose convictions were of a positive, decided character. At the time of making his will, he had accumulated, by his own industry and energy, a property amounting to \$75,000, and at the time of making his will, as well as up to the day of his death, was active in the conduct of his varied business affairs.

His three children had died in their infancy, many years ago, so that his only heirs at law and next of kin were J. Hamilton Crumb, a half brother, and an unknown nephew, Sidney Crumb, both living in Ohio.

The will in question was drawn by L. B. Kern, Esq., of DeRuyter, a gentleman who for twenty years or more had been Mr. Crumb's attorney, his intimate personal friend and confidential adviser, and was witnessed by Mr. Kern and his wife. The circumstances preliminary to, and attending its execution, as testified to by Mr. Kern, are as follows: April 29, 1884, Mr. Crumb called at the office of Mr. Kern and said to him he supposed he ought to make a will, that at the present price of real estate he was worth \$75,000, and that he desired to give all his property to his wife, except four or five thousand dollars which he wished to give in small legacies to different persons; that he was not indebted to his relations, as they had never done anything for him, and he did not propose to give them much. Mr. Kern testifies that he made a written memorandum of Mr. Crumb's suggestions as to his will, and that he drew one during that day as re-

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quested by him; that, in the evening, the testator called at his office and said that he had talked with his wife about the matter, and she was opposed to his making such a will, and the will was not executed. May 2d, 1884, he again called and requested Mr. Kern to draw another will leaving out some of the legacies named in the former unexecuted will, and said he would talk with his wife about it, and see if she would not be satisfied with it.

On May 6th, 1884, Mr. Crumb again called upon Mr. Kern, and said his wife would not consent to his executing this will, and that he and his wife had agreed upon the following arrangement for the disposition of each other's property, to wit: That he was to will all his property to her, and she to will all her property to him, and each was to leave a written memorandum of gifts which the survivor was to distribute. In pursuance of Mr. Crumb's directions, he drew two wills, one for Mr. Crumb and one for his wife, each bequeathing to the other all the property he or she possessed, and at the testator's request he and his wife went to Mr. Crumb's house that evening to attend the execution of the two wills.

After Mr. Kern went into the house, Mr. Crumb said he had desired to give Emma Crumb a little remembrance, and to give a half sister something, to which Mrs. Crumb said that his relatives had never done anything for him and had never treated him decently, and he was under no obligations to give them anything, and so far as the other persons were concerned, she would carry out his wishes if she lived the longest; whereupon Mr. Crumb said: "I have



## WILL OF CRUMB.

had Mr. Kern draw the wills as we agreed, embodying this arrangement." At this point of time Mr. Kern said to Mr. Crumb he had drawn the wills in pursuance of what he had told him, and that they were ready for execution, whereupon Mr. Crumb signed the will, declaring it to be his last will and testament, and requesting Mr. and Mrs. Kern to sign the same as witnesses, which they immediately did in his presence; that the said will was not read by Mr. Crumb before its execution, nor was it read to him by anyone, nor had he seen it before this time; that from the time the will was drawn Mr. Kern had the sole custody of it, and he had not disclosed its contents to any one; that, immediately after the will was executed, Mr. Kern and Mr. Crumb left the house together and went down town, leaving the will upon the table, Mrs. Crumb's will being also executed at the same time, and left in the same place.

Mr. Kern testifies that Mr. Crumb gave him directions from which he drew the will; that he drew it precisely according to the instructions given him, exactly as he was directed to draw it; that Mr. Crumb was not in any way deceived as to what the contents of the will were, as he drew it just as he asked him to; that he made the written memorandum from which the will was drawn while Mr. Crumb was at his office, and which is as follows: "J. H. Crumb's will, May 6th, 1884, and Sarah M. Crumb's will.—Crumb gives all his property of every kind to his wife, she to be executrix with power to sell and convey, etc. Sarah M. Crumb gives all her property to J. H. Crumb, he to be executor with power to sell, etc. Kern and his

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wife to be witnesses ;" that he made this memorandum at his direction, as he directed him to, and in his presence ; and from it he drew the two wills, incorporating in each of them the provisions of the memorandum ; that he did not read the will to Mr. Crumb because he knew what it was, or knew what the will would be from the memorandum he gave him.

The following questions and answers appear in the evidence of Mr. Kern :

*Q.* At the time you supervised the execution of this will did you intend to comply with all the requirements of the statute and the law, making it a valid will ?

*A.* I did, and I should have read it over to him, if it had not been for the conversation between Mr. and Mrs. Crumb, because I supposed he understood it. .

*Q.* You have not any doubt about the fact that Mr. Crumb at the time of this execution, did understand the contents have you ?

*A.* I don't think he could have known except by taking my word, it was not read to him.

*Q.* You haven't any doubt about the fact that Mr. Crumb at the time of its execution did understand the contents have you ?

*A.* I have not if he believed me.

*Q.* Why should you believe that he understood its contents, if he didn't read it, or hear it read ?

*A.* Because he left the memorandum with me to draw two wills, and he had every reason to believe that I would draw it according to his memorandum.

*Q.* Did you tell him that you had so prepared it ?

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A. I told him that I had prepared the two wills according to the talk we had at my office.

Q. And according to his direction?

A. Yes, sir.

Q. And was that before the execution of the will?

A. It was before the execution of the will.

Mrs. Kern agrees with her husband as to what occurred at Mr. Crumb's house at the time of the execution of the wills. Upon the other hand Mrs. Crumb testified that both wills, instead of being drawn by Mr. Kern at his office were drawn by him at the house at the time they were executed; that Mr. Crumb's will was read over to him, and was also read by him before it was executed.

Without making any findings of fact at this time as to whether the will in question was drawn and executed as Mrs. Crumb says it was, or as Mr. Kern swears it was, we come to the legal proposition suggested by the evidence of Mr. Kern, and hold that it is not necessary to the valid execution of a will that it should be read by the testator or to him, provided it was drawn according to his directions, and he was informed, before he signed it that it had been so drawn.

The law in relation to the execution of wills is as follows:

“Every last will and testament of real and personal property, or both, shall be executed and attested in the following manner:

1. It shall be subscribed by the testator at the end of the will.

2. Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or

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shall be acknowledged by him to have been so made to each of the attesting witnesses.

3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament.

4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will at the request of the testator."

It will be observed, from the above, that every provision of the statute was complied with by Mr. Crumb, so that in this respect there is no defect of execution. It is claimed, however, by the contestant that, over and beyond those statutory requirements, there are certain conditions and precautions which must exist and be complied with, and, among them, that the will must be read by or to the testator before its execution. We concede that this ought to be done in every case, but so long as the statute does not require it to be done, we suppose courts are powerless to compel the performance of a duty so just and reasonable, so necessary indeed for the protection of the testator and his legatees or heirs. In the *White* case (15 *N. Y. S. R.*, 753) we said: "We think it is the duty of witnesses to wills to know, by inquiry of the testator or otherwise, whether or not he has personal knowledge of the contents of the paper he is about to sign as his last will and testament. Unless this is done, there might not be any evidence that the will had ever been read to or by him; no evidence that he ever had knowledge of its contents, and thus opportunity would be afforded to take advantage of his

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confidence or carelessness, to impose a will upon him not in accordance with his directions or intentions; especially would this be so in case of the aged, sick or infirm, who might be powerless to protect themselves from being surrounded by those who would not hesitate to benefit themselves by fraud, coercion or undue influence, and possibly crime."

The present case illustrates the propriety of the above suggestions, for if the attesting witnesses had known that the will was read to, or by, the testator, the Crumb estate would not have been compelled to litigate the question as to the legal execution of the will and would thus have been spared the expense it has incurred. Subscribing witnesses to wills ought to be able to satisfy the court that the testator has personal knowledge of the contents of the paper he signs and declares to be his last will; ought to know that it has been read to or by him, either from hearing it read, or from the declarations of the testator that he knows the contents of his will. But we recognize the fact that a testator may, without reading his will or hearing it read, have such knowledge of his will as will be sufficient to satisfy the court, beyond any doubt, that he was familiar with its contents and there was no mistake, or fraud, or misunderstanding in its drafting or its execution. That Mr. Crumb had full knowledge of the contents of his will before he signed it is freed from any doubt or suspicion by the evidence of Mr. Kern, who testifies that he made a written memorandum of Mr. Crumb's instructions and directions, that he drew the will in exact accordance with these directions, and that, before the will was executed,

he told the testator he had drawn the will as he had directed him to draft it, and the memorandum thus made is produced and put in evidence, showing that the will was written as directed, so there can be no question that he had knowledge of the contents of his will, if truthful information as to its contents is such knowledge as will satisfy the court upon the point and comply with the legal requirements necessary for the due execution of a will. If he had read the will himself, or had it been read to him by Mr. Kern, he would have known no more of its contents than he knew when he was told that it had been drawn as he directed; the information conveyed to him a knowledge of all its provisions because he knew what he had directed Mr. Kern to insert in his will; he accepted this statement of Mr. Kern as true, and acted upon that belief, and the evidence conclusively shows he was not deceived as to its contents.

The reading of the will to or by the testator if he has given directions as to its provisions is simply a matter of precaution and prudence to prevent any question arising as to whether he is fully and correctly apprised of its contents, and to impress upon the memory of the attesting witnesses the fact, if they or either of them were present when it was read, that the testator knew the contents of his will, and gave a deliberate and intelligent assent to its provisions. All that the law requires on this point is that it shall appear by satisfactory evidence that in some suitable and proper manner the testator understood the contents of the instrument he was signing, and it is only in exceptional cases that it must be made to appear that the

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will was read to the testator and explained to him. If a person is in health, of ordinary intelligence and ability, able to read and write, the necessity of proving that the will was read to or by him at or before its execution does not exist, because the fact that he executed it in the manner required by the statute creates the legal presumption that he was aware of its contents. If however, he is unable to read, or his capacity to do so is doubtful, it has been held that it must appear that the will was read to him or that it conforms strictly to his instructions, and in such cases it is the duty of the witnesses to make inquiry of the illiterate testator and ascertain whether the will is in accordance with his wishes.

In a majority of cases, men employ attorneys to draw their wills because they do not feel competent to give expression to their intentions in a legal manner or in proper form, while others employ them because they are unfamiliar with the requirements of the statute, but in either case, or in other cases, when an agent is employed, the testator adopts the language of those who give expression to his wishes and his instructions and makes it his own. When a will thus drawn is executed by him as required by law, the manner in which its contents are communicated to him before its execution is immaterial provided it is so done that he clearly understands and approves all its provisions. If an attorney is employed by a competent and intelligent testator to draw his will, and when drawn places it before him and says the will is drawn according to his instructions, and the evidence upon its probate shows the statement to be true, he has such

knowledge of the instrument he declares to be his will as answers the requirements of the law and fulfils the exacting conditions of courts relating to its execution.

The law has not specified or limited the manner in which knowledge of the contents of wills shall be communicated to testators, and until this is done courts must accept such evidence as will satisfy them of the fact, applying the same tests to the credibility of witnesses who claim to impart the information to testators, as exist in any other legal proceeding. Its weight, its convincing power, will be for the court to determine, after it has learned all the circumstances under which it was imparted and which surrounded the testator at the time of the execution of the will, especially his physical and mental condition, his ability to know and clearly understand and appreciate the information as to its contents, the sources of his information and the character and integrity of the witnesses who may give their evidence in court. In this case, Mr. Crumb had knowledge of the contents of his will, because he had truthful information of what it contained, he was made aware that his instructions for the disposition of his property had been strictly followed, he had the intelligence and the ability to comprehend and understand the statement of Mr. Kern that he had drawn the will as he requested, and sufficient confidence to be convinced of the truth of what was said to him, and these facts were equivalent to reading the will himself, or of having it read to him.

By holding, as we do, that the will was properly executed in this respect, we do not intend to assert that



the omission to have a will read by or to a testator might not, in some cases, be sufficient ground for its rejection ; all we maintain is, that it is not an absolute prerequisite to its valid execution in all cases. But, notwithstanding the conclusion at which we have arrived, we still insist that it is the duty of testators to read their wills or have them read to them by some one in whom they have confidence, in order that the court may have conclusive evidence that they clearly understand, sanction and approve all their provisions, because if this is not done, a court might hesitate and possibly refuse, sometimes, to rely upon the evidence offered to prove the fact that the testator had knowledge of the contents of his will, and so reject its probate. The law has established certain safeguards, in order to have conclusive or at least satisfactory evidence of the proper execution of wills, and the more clearly they are observed, the less likely will there be objections to their probate, and the more surely and certainly will the intentions of testators be carried into effect.

In *Worthington v. Kleim* (144 *Mass.*, 167 ; s. c., 5 *Am. Pr. R.*, 415 ; 10 *E. R.*, 291), the evidence was that the attorney drafted the will according to the instructions of the testatrix, that he offered to read it to her, but she declined, saying he could do so at some other time, and the will was never read to or by her. The court found, as facts in the case, that the contents of the paper, when signed by her, were what she intended they should be, and what she believed them to be, and she believed the instrument to be duly executed as her will. The court said : " It is plain that,

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on such a finding, the will must be allowed unless the law requires that a will be read by or to the person executing it. Such is not the law ; it is sufficient if the court is satisfied, by competent evidence that the contents of the will were known to and approved by the person executing it at the time it was executed as a will."

Within the doctrine of this case, which we hold to be sound law, there can be no doubt what our decision must be. The preservation of the written memorandum containing the directions of Mr. Crumb for his will leaves no possible chance for the existence of any mistake as to what the contents of the will should be, nor can there be any doubt but Mr. Kern before its execution told the testator that it contained what he had been instructed by him to insert in his will. These two facts being undenied, and established by competent evidence to the satisfaction of the court, we see no reason why the will in question was not properly executed, and a decree will, therefore, be entered, in accordance with this decision.

## APPENDIX.

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Per HON. A. D. KENNEDY, SURROGATE OF MADISON  
COUNTY, June, 1888.

AT the close of his opinion, in the matter of the accounting of Harriet L. Bushnell, as general guardian of May Burlingame, the Surrogate said as follows :

HAVING disposed of the questions at issue in this proceeding, we take occasion to make some suggestions to guardians and their bondsmen.

1. A guardian, as soon as the property of his ward comes to his hands, should make and file with the Surrogate an accurate inventory of the property.

2. If the funds of the ward are not invested when they come to the guardian's possession, he should invest them as soon as it can reasonably be done, and so far as possible keep the same and the income thereof invested till his ward become twenty-one years of age, or where by reason of death, or other causes, he is sooner called upon to account and pay over the funds to others.

3. He should procure a book and devote it exclusively to matters pertaining to the guardianship, and in it should be set down, at the time of its occurrence,

every item of income and expenditure on behalf of the ward intended to be a credit or a charge against him.

4. Receipts for all expenditures, except for very trifling sums, should be taken and preserved until the final accounting.

5. The guardian should expend no more than the income of the ward for his support and education, without an order of the court for that purpose obtained. Section 2846 of the Code is as follows: "Upon the petition of the general guardian of an infant's person or property, or of the infant, or of any relative or other person in his behalf, the Surrogate, upon notice to such persons, if any, as he thinks proper to notify, may make an order, directing the application by the guardian of the infant's property, to the support and education of the infant, of such sum as to the Surrogate seems proper, out of the income of the infant's property, or where the income is inadequate for that purpose, out of the principal."

6. In 4 *Redf.*, 360, the following is stated to be the law when the parent is the guardian of his child: "It is then no part of the duty of a guardian, simply as such, to contribute to the support of the ward out of his own funds, but it is the primary duty of a parent, whether father or mother, if of sufficient ability. Without regard to this duty, imposed by the law of nature, our statutes expressly recognize the obligation of the parent to prevent the child from becoming a public charge. If, however, the parent be also the guardian of a minor, having an estate of its own, then the circumstances of the parent as well as the amount of the estate of the ward, may be

taken into consideration in fixing the degree of, and determining whether there is any liability of the former (*Matter of Burke*, 4 *Sandf. Ch.*, 617; *Matter of Kane*, 2 *Barb. Ch.*, 375; *Miller v. Rogers*, 6 *Johns.*, 566). The same cases also establish the principle that an allowance may be made for past maintenance and support of a ward in a proper case. No inflexible rule can be established, but each case must be determined on the facts peculiar to it. The proper course to pursue, when the income is insufficient, is for the guardian to make application to the court for leave to use so much of the principal as may be necessary; but in case he proceed without such leave, the court may, if the proceedings seem to have been wise, and for the welfare of the ward, sanction it."

7. We invite special attention to the following provisions of the Code :

§ 2842. A general guardian of an infant's property, appointed by a Surrogate's court, must, in the month of January of each year, as long as any of the infant's property, or of the proceeds thereof, remains under his control, file in the Surrogate's court the following papers :

1. An inventory, containing a full and true statement and description of each article or item of personal property of his ward, received by him since his appointment, or since the filing of the last annual inventory, as the case requires: the value of each article or item so received; a list of the articles or items remaining in his hands; a statement of the manner in which he has disposed of each article or item not remaining in his hands; and a full descrip-

tion of the amount and nature of each investment of money, made by him.

2. A full and true account, in form of debtor and creditor, of all his receipts and disbursements of money during the preceding year ; in which he must charge himself with any balance remaining in his hands at the conclusion of the year, to be charged to him in the next year's account.

§ 2843. With the inventory and account, filed as prescribed in the last section, must be filed an affidavit, which must be made by the guardian, unless, for good cause shown in the affidavit, the Surrogate permits the same to be made by an agent or attorney, who is cognizant of the facts. The affidavit must state, in substance, that the inventory and account contain, to the best of the affiant's knowledge and belief, a full and true statement of all the guardian's receipts and disbursements, on account of the ward ; and all money and other personal property of the ward, which have come to the hands of the guardian, or have been received by any other person by his order or authority, or for his use, since his appointment, or since the filing of the last annual inventory and account, as the case requires ; and of the value of all such property : together with a full and true statement and account of the manner in which he has disposed of the same, and all the property remaining in his hands at the time of filing the inventory and account ; and a full and true description of the amount, and nature of each investment made by him since his appointment, or since the filing of the last annual inventory and account, as the case requires ; and that he does not know of any error or omission in the inventory or

account, to the prejudice of the ward. The Surrogate must annex a copy of this and the last section, to all letters of guardianship of the property of an infant issued from his court.

We do not think guardians appreciate the importance of conforming to these positive commands of the law. Such a sworn statement has a tendency to impress upon them the necessity of keeping accurate accounts, and of making legal investments. In the next place, in case of the loss or destruction of their securities or accounts, they would find it not only a matter of convenience but of safety for them to have the annual records of their dealings with the trust estate in possession of the court, and besides this, in case of their death their heirs would have no difficulty in ascertaining the liability of the guardian; they would know where to find a statement of the guardian's relation with his ward. So too, if any friend of the minor had reason to believe the interests of the ward were not properly taken care of, he would know where to ascertain the true condition of affairs, and could give such information to the Surrogate as might be necessary to secure prompt action on his part to protect the ward's estate from injury.

But we think the section of the Code above quoted should be amended so that in addition to filing such a statement as the law requires with the Surrogate in the month of January of each year, the guardian should also be required to serve a copy of his statement upon each of his bondsmen, in order that they may know the extent of their liability as bondsmen and the condition of the ward's estate. If a person indorses a note, his liability generally ceases in a

short time; if he signs an administrator's bond the estate is ordinarily settled at the expiration of eighteen months, and sometimes at the end of a year; but guardians' bonds run from a very short period up to twenty years. We think men liable upon this class of bonds should have exceptional protection, and we know of no more certain and effective way than to require guardians to serve a copy of their annual statement upon their sureties. The bondsmen could then determine whether the condition of the estate was such that they were willing to remain liable any longer upon the guardian's bond, and if they did not so wish to remain, could then make application to the Surrogate to be relieved from any further liability.

It is true the Surrogate has no power to compel a guardian to serve a copy of his annual statement upon his bondsmen in the month of January in each year, but if it is not hereafter done we suggest that the sureties make application to the Surrogate to be relieved from further liability, whereupon an order would be made requiring the guardian to file a new bond or to be removed from office. Beside the protection which the bondsmen would receive by pursuing the course we have suggested, the minor would also receive additional protection to his estate, because the bondsmen, who have direct personal and financial interest in knowing the condition of his estate and in watching over his affairs, would be in a condition to call the attention of the Surrogate to any irregularities or mismanagement on the part of the guardian.

The present case illustrates the justice and advantages of such a course as we have pointed out because if the bondsmen had known the uses to which Mrs.



Bushnell put her children's money, we presume they would not have remained long on her bond, and she would have been compelled by the Surrogate to invest, and keep invested, the funds of her wards, till they become of age, nor would there have been any loss to May of many thousand dollars upon the mortgage given to the county treasurer for her benefit.

As near as can be estimated, there is annually placed in the hands of guardians an average of not less than \$50,000, and if we assume a period of eight years as the average length of a guardianship it will be seen that there is the sum of \$400,000 in the hands of guardians, varying in amounts from very small sums to many thousands. Bonds have been given for this amount by men who swear they are worth twice the sum above named, so that there is probably not less than one thousand men in the county who are directly and financially interested in knowing the condition of the estate for which they stand as sureties, and in our judgment ought to know at stated intervals whether the trust fund is secure or not, and whether the guardians are properly discharging their duties. Men will go upon such bonds with less reluctance if they know that they must be occasionally consulted in regard to the management of the estate or, at least, be permitted to know its condition at frequent intervals.

So, too, it would have a tendency to make guardians more careful, if they felt that for every minor, whose property was in their hands as guardian, there were at least two responsible men, watching over his affairs and ready, at all times, to protect not only his person but his property, from wrong. It is important,

then, that these estates, whether large or small, which have been left to these minor children, should be carefully watched and tended, and devoted to their interests and happiness. A little help, as they start out in life, may be the means of moulding their destiny wisely, may be the stepping stones to a life respected and honored by all. To aid and protect them, the court is ever ready to listen to their appeals, its hands are always near to lead them in paths of safety, its doors are evermore ajar awaiting the tread of every child to whom a wrong has been done. In the closed bud of their unblossomed years lie sleeping, dreaming, the good or ill whose fruit may hereafter ripen upon the tree of life, and it is the duty of the court to see that the heritage which some father or mother has left them shall nourish its roots and make shapely the boughs from which the harvest must be gathered.

8. Guardians should not loan the money of their wards upon personal security, for, if they do so, and the maker of such securities subsequently becomes insolvent, they will be compelled to make good the loss to the estate, and in addition, will be compelled to bear the expenses of litigation made necessary to collect the funds thus improperly invested. While the statutes of this State have not specified any particular class of securities in which trust funds should be invested the courts have generally held that trustees must invest in loans on real estate, in the bonds of the State, or of the United States, and that neither good faith, care, nor diligence will protect them in the event of loss, where this rule is departed from. No loan should be made upon real estate for more

than half its value, and in every instance there should be an official search showing a clear title to the land.

If satisfactory securities cannot be obtained after reasonable efforts to do so, the money should be deposited in some savings bank where it will draw interest until securities can be obtained.

9. Guardians should deposit all trust funds as soon as received by them in some bank of good repute, because, if kept about their persons or in their dwellings, and the money is stolen or lost, or destroyed by fire, they will be liable for its loss. In *Cornwall v. Deck* (8 *Hun*, 122), an administratrix kept a large amount belonging to the estate in her house, and the same was stolen. The court held her liable therefor, and said that the trustee, at the present time when banks and places of safe deposit so largely abound, would be held liable for negligence, because a man of common prudence, and acting with caution, would not retain the custody of money or valuables liable to be stolen in such a place, when he could easily deposit them in a place of safety. It is repeatedly held that if a trustee, in the exercise of his best judgment, deposits money in a bank of good repute that he is not liable in the event of the failure of the bank. In *Wharton on Negligence*, § 519, and cases there cited, it is held that a guardian having funds of his ward, should not keep them in his house, but deposit them in a bank.

Again, these funds should be deposited to his credit as guardian, and not to his individual account in the bank or mixed with his own funds, for if he mixes the trust funds with his own, and uses them in his business, he is liable to pay compound interest, not only

as a penalty for his improper conduct in relation to the trust fund, but also to enable the ward to receive all the interest which his money would have earned if invested and its accumulations kept re-invested.

10. Under no circumstances, no matter how great the temptation, should guardians appropriate the money of the ward to their own use. This fund should be regarded as sacred against their touch for such a purpose. In a legal sense, the ward is their neighbor and his castle should be secure against the uninvited steps of him who seeks to enter for an illegal purpose. And yet men who would not for a moment think of taking another's property without his consent, and devoting it to their own use, do not hesitate occasionally to appropriate funds in their hands as trustees to their own benefit, or the benefit of others. In order that guardians and others having trust funds in their hands may know the danger they run by appropriating such funds to their own use, may know the criminal character of such an act and the penalties to which they may be subjected, we quote § 541 of the Penal Code :

“A person acting as executor, administrator, committee, guardian, receiver, collector or trustee of any description, appointed by a deed, will or other instrument, or by an order or judgment of a court or officer, who secretes, withholds, or otherwise appropriates to his own use, or that of any person other than the true owner, or person entitled thereto, any money, goods, things in action, security, evidence of debt or of property, or other valuable thing, and any proceeds thereof, in his possession or custody by virtue of his office, employment or appointment, is guilty of grand

larceny in such degree as is herein prescribed, with reference to the amount of such property, and upon conviction, in addition to the punishment in the chapter prescribed for such larceny, may be adjudged to pay a fine, not exceeding the value of the property so misappropriated or stolen, with interest thereon from the time of the misappropriation, withholding or concealment and twenty per centum thereupon in addition, and to be imprisoned for not more than five years in addition to the term of grand larceny, according to this chapter, unless the fine is sooner paid.

We have done. All the suggestions we have made in regard to the duties of guardians may be summed up in the words of Him who spake as never man spake—"Therefore all things whatsoever ye would that men should do to you, do ye even so to them; for this is the law and the prophets." Do then unto these children thus placed in your care as you would that men should do to yours, if you shall pass away from earth in their youth, and you will have discharged your duties with fidelity to the trust reposed in you, and all your acts will meet with the approval of the court.

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## UNSETTLED ACCOUNTS.

[March, 1888.]

RANSOM, S.—The power and duty of the Surrogate to call upon executors, administrators, guardians and testamentary trustees to account upon his own motion has been lost sight of by persons holding such positions, and by many attorneys, on account, probably, of the fact that, as a rule, such officers are usually proceeded against by those having an interest in the estates committed to their charge. The history of the origin of the office of Surrogate clearly shows that he is to act in the place of a deceased person : and on his own motion he may and should require any executor, administrator, guardian or testamentary trustee, or trustee appointed by himself, to give an account of his stewardship.

The reason for this rule is obvious, and there is abundant authority to sustain it. In the great city and county of New York, thousands of these officers are appointed by the Surrogate every year, and in many instances they have not pretended to comply with the law, which requires them to account, especially those who have not been required to give security for the faithful performance of their duties.

Again, many of these officers seem to regard the estates in their charge as in some sense their own, and they act accordingly, and others, through sheer ignorance and incapacity, carelessness and rank dishonesty, evade and avoid their duty to account. A very large number—perhaps the larger number—of

the beneficiaries of estates, are so under the dominion of these officers that they are practically helpless. Many others have not the pecuniary ability to take proceedings to compel an accounting, which always entails a more or less heavy expense: and so, from these causes and others which could be stated, such officers remain practically forever in the possession of estates which do not belong to them and which should be distributed.

It is no doubt true that the Surrogate cannot, on his own motion, compel a judicial settlement—that is, a final settlement of the account—but an account which is defined to be “intermediate” can be compelled and the officer may be required by the Surrogate to execute his decree thereon, or punish him as for a contempt, or remove him, or both. This must be so, otherwise there is no force whatever in the plain provisions of the statute hereafter cited.

However this may be, I have determined upon a course of duty in regard to these matters, and I shall call upon all such officers who, for a considerable period of time after eighteen months since their appointment, have not accounted, to do so. No doubt, in most cases, such officers will thereupon petition the court for a judicial settlement of their accounts; that would be their plain duty at least. In all cases of an accounting the Surrogate is authorized by sections 2546 and 2573 of the Code of Civil Procedure, which is a substantial re-enactment of former provisions of the Revised Statutes, to appoint referees to take and report the evidence upon the facts . . . . . “to examine an account rendered, to hear and determine all questions arising on the settlement of such an account

which the Surrogate has power to determine" (Matter of Ritch, 2 *Redf.*, 239). In this case the court says "that wherever this court has the power to compel a representative of an estate to render an account, that proceeding involves the authority to consider and pass upon the accuracy of the account, and to refer it to an auditor to determine its accuracy" . . . . . (see Geer v. Ransom, 5 *Redf.*, 578; Matter of Scofield, *Daily Reg.*, Feb'y 25, 1881; Westervelt v. Gregg, 1 *Barb.*, Ch. 479; Matter of Douglas, 3 *Redf.*, 538; Tucker v. McDermott, 2 *Redf.*, 312). In this last case the Surrogate issued an order requiring the testamentary trustees to render an account.

The following cases are decisive upon the question, and impel me forward on the line of duty marked out:

Campbell v. Bruen (1 *Bradf.*, 224): "After eighteen months an executor may be required to render an account, either on the application of some person having a demand against the personal estate of the deceased as creditor, legatee or next of kin, or by the Surrogate on his own motion, without such application . . ." Thomson v. Thomson (1 *Bradf.*, 24): "Surrogate, of his own motion, can enforce the return of an inventory after three months from the time of issuing letters testamentary or of administration, and the rendering of an account after the expiration of eighteen months.

In Rogers v. King (8 *Paige*, 210), the court decided that the Surrogate has concurrent jurisdiction with a court of equity to compel administrators to account and make distribution.

In Gratacap v. Phyfe (1 *Barb. Ch.*, 485), Chancellor



WALWORTH says: "The statute authorizes the Surrogate to make an order after the expiration of eighteen months from the time of the appointment of the administrator, that he render an account of his proceedings, and such an order may be granted upon the application of a person having a demand against the personal estate of the decedent as creditor, legatee or next of kin, or in behalf of a minor having such claim, or it may be made by the Surrogate ex-officio, without any such application. The proceedings, however, are entirely different where the order is made by the Surrogate ex-officio, from what they are when it is made upon an application in behalf of a person interested as a creditor or as a legatee or as the next of kin of the decedent. In the first case it may perhaps sometimes be proper for the Surrogate to make an absolute order in the first instance, as it is a matter resting in the discretion of the Surrogate, whether he will or will not require an account of the administration of the estate, although no person interested thinks proper to institute a suit for that purpose. And it undoubtedly is a proper exercise of such discretion for the Surrogate to require such an account ex-officio whenever in his opinion the rights of minors who are interested in the estate, as legatees or next of kin, render such an account proper (*Roberts v. Roberts*, 2 *Lee's Eccles. Rep.*, 399)."

By R. S., Part II., ch. VI., title 3, article 3, § 52, "an executor or administrator, after the expiration of eighteen months from the time of his appointment, may be required to render an account of his proceedings by an order of the Surrogate, to be granted upon application from some person having a demand against

the personal estate of deceased, either as creditor, legatee or next of kin, or of some person on behalf of any minor having such claim ; or without such application. . . .”

By sec. 73 it is provided : “ If, upon being required by any Surrogate to render an account, an executor or administrator desires to have the same finally settled, he may apply to the Surrogate for a citation, which such Surrogate shall issue, requiring the creditors and next of kin of the deceased, and the legatees, if there be any, to appear before him on some day therein to be specified and to attend the settlement of such account.”

From these two sections it will be seen that before the Code of Civil Procedure went into effect, an intermediate accounting could be compelled by the Surrogate on his own motion at any time after the expiration of eighteen months from the time of the appointment of the executor or administrator.

The provisions in the Code of Civil Procedure which have taken the place of the above two sections are sections 2723, 2724 and 2726.

Section 2723 governs and relates solely to the rendition of an intermediate account by an executor or administrator ; it provides that the Surrogate may, in his discretion, make an order requiring an executor or administrator to render an intermediate account. In either of four cases the first three subdivisions relate in specific language to where the proceeding is instituted by a creditor, legatee, etc., but subdivision four provides :

“ Where eighteen months have elapsed since letters were issued and no special proceeding upon a petition

for a judicial settlement of the executor's or administrator's account is pending."

The learned codifier, in commenting upon this section, says that subdivision 4 has been taken from 2 R. S., Part 2, ch. 6, tit. 3, sec. 52, amended by confining it to a case where proceedings for a judicial settlement have not been taken, in accordance with the supposed intent of the legislature, that one object of conferring upon the Surrogate a general power to cite the executor or administrator to account, without a petition, was doubtless to enable persons interested to determine whether a final accounting was necessary. It is thus apparent that section 2723 was intended to give the Surrogate the same power as to the compelling of the filing of an intermediate account as the Revised Statutes, with this one exception, that where proceedings for the judicial settlement have been taken, an intermediate account cannot be asked for either by a creditor, legatee, etc., or by the Surrogate himself. Now it is important to understand why this distinction exists. It is this: By the Revised Statutes there was no provision for the judicial settlement of an executor's or administrator's account unless a proceeding was instituted primarily for an intermediate accounting by a person having a demand against the personalty of deceased or by the Surrogate himself, and then the executor or administrator could petition that his account be finally settled, and in no other way could a judicial settlement be had.

Section 2723 of the Code of Civil Procedure refers exclusively to the rendition of an intermediate account, and section 2724 provides in what cases a judicial settlement of the account may be compelled, and section

2726 sets forth the procedure on such an application. It is, therefore, obvious that if a proceeding for the judicial settlement of an executor's or administrator's account is pending, that an application for an intermediate account would be unnecessary, and useless for the purpose of determining the condition of the estate.

The proceedings which were formerly covered by one section of the Revised Statutes are now separated and governed by the three sections of the Code named. It is, therefore, conclusive that the Surrogate, on his own motion, has the power to compel the rendition of an intermediate account by an executor or administrator after eighteen months have expired since their appointment. But we must go a step further. It would be an easy matter for the accounting party to present an alleged account, which disclosed little or nothing, or may be absolutely false in every particular; and if the jurisdiction and power of the Surrogate ceases as soon as the alleged account is filed, the proceeding has failed to benefit the estate or the parties interested therein in the least. The fraudulent or mistaken character of the account could not be proved, nor could its correctness be impeached, and thus the whole proceeding would be useless for the purpose of procuring a true and correct account.

I am convinced, however, that the power of the Surrogate does not cease there; that upon the filing of the intermediate account he can compel the accounting party to submit to an examination, the same as if objections to the account had been filed and his account contested.

## SURROGATE COURT RULES, N. Y. COUNTY.

[In force January 1st, 1888.]

**RULE 1.** A special motion calendar will be called on each Thursday at 10:30 A. M., except during the month of August. No calendar will be called during that month.

**RULE 2.** To entitle a motion or proceeding to be entered upon the motion calendar, proof of service of all orders, citations, summons and other papers on which the motion or application shall be made, must be furnished to the clerk of this court at or before 1 o'clock on the day preceding the calendar day. No motion shall be adjourned without showing to the satisfaction of the Surrogate legal grounds therefor; except upon the return day thereof, when it may be adjourned for a week on filing with the clerk the written consent of the parties.

**RULE 3.** No mandate issued out of this court shall be deemed duly served, unless copies of the petition or other paper or papers upon which it shall be issued, and upon which relief is sought, shall be served with it, except the following :

1. Citation to attend probate.
2. Citation to revoke probate.
3. Citation on application for administration.
4. Citation for intermediate account.
5. Citation to attend judicial settlement of account.
6. Citation to temporary administrator to account.
7. Citation to principal in a bond to give new sureties in place of sureties who apply to be released.
8. Order of temporary administrator to make deposit.
9. Order to executor to appear and qualify.
10. Order requiring the executor or administrator to file inventory.
11. Why an account should not be made on Surrogate's motion.

**RULE 4.** A party seeking to contest the probate of a last will and testament must file a written appearance with the clerk of this court, together with a written and verified answer, containing a concise statement of the grounds of his objection to such probate, and any facts he may allege tending to show a want of jurisdiction of the Surrogate court to hear such probate. In case such jurisdiction shall be denied or the right of any objecting party to appear and contest shall be questioned, the Surrogate will first hear and pass upon the question of jurisdiction of the status of the contestant, unless for the convenience of the parties or the court, the Surrogate shall order otherwise. When a contestant files with the Surrogate the notice provided for by section 2618 of the Code of Civil Procedure, requiring the examination of all the subscribing witnesses to a will, or any other material witness, he must present with such notice an affidavit showing the materiality of the testimony of the witnesses or witness sought to be examined, and an order requiring the production by the proponent of such witnesses or witness. A copy of such order, if the same shall be signed by the Surrogate, must be immediately served upon the proponent or his attorney.

In probate proceedings when all parties in interest have waived the service of citation, notice of at least two days must be given to the probate clerk before the testimony of the subscribing witnesses will be taken.

In probate proceedings, the will, if not filed with the petition, must be deposited with the probate clerk at least two days before the return day of the citation, otherwise an adjournment will be taken to afford time for the preparation of the necessary papers.

**RULE 5.** Wherever a party shall put in issue on probate, the validity, construction or the effect of any disposition of personal property under section 2624 of the Code, if it shall appear to the Surrogate that the persons interested in such construction are not before the court, he shall suspend the determination of such question until such persons shall be

made parties; and the executor named in the will shall not be held to represent the legatees therein for the purpose of such construction.

**RULE 6.** Whenever any person shall appear in support of the will propounded under section 2617 of the Code, such person shall not thereby become entitled to recover any costs on the probate of said will, unless it shall appear to the satisfaction of the Surrogate that the interest of such person was not sufficiently represented and prosecuted by the executor named in the will and his counsel.

**RULE 7.** On any accounting by an executor, administrator, guardian or trustee which may be contested, any party interested, or a creditor desiring to contest the account, shall file specific objections thereto in writing, and serve a copy thereof upon the accounting party, or upon his attorney in case he shall have appeared by attorney, within eight days after the filing of the account in the Surrogate's office, where the accounting is a compulsory one, and within eight days after the return of the citation where the accounting is a voluntary one, or within such further or other time in either case as shall be allowed by the Surrogate; and the contest of such account shall be confined to the items or matter so objected to. If it shall appear to the satisfaction of the Surrogate by affidavit or petition that an examination of the accounting party will be necessary to enable the contesting party to interpose his objections, such examination may be ordered by the Surrogate for that purpose.

**RULE 8.** When a referee's report shall be filed, together with the testimony taken before him, said report shall be confirmed as of course, unless exceptions thereto shall be filed by any party interested in the accounting or proceeding within eight days after a written notice of such filing, and a copy of such report shall have been served upon the opposing party; and in case exceptions shall be so filed, any party may bring on the hearing of said exceptions on eight days' notice, on any stated motion day of said Surrogate's court.

**RULE 9.** All orders and decrees to be entered in litigated motions, unless settled by consent, must be noticed for settlement, and a copy of the proposed order served at least one day before the same shall be presented for settlement at the Surrogate's Chambers, and all decrees to be entered in contested probate or accounting proceedings shall be settled before said Surrogate, at his Chambers, on two days' notice, and the service of a copy of the proposed decree; and no such order or decree will be signed in the absence of the opposing attorney, unless proof or admission of such service shall be presented to the Surrogate on such settlement.

**RULE 10.** No special guardian to represent the interests of an infant in any proceeding in said Surrogate's court will be appointed on the nomination of a proponent or the accounting party, or his attorney, or upon the application of a person having an interest adverse to that of the infant. To authorize the appointment of a person as a special guardian on the application of an infant or otherwise in a proceeding in this court, or to entitle a general guardian of such infant to appear for him in such proceeding, it must appear that such person, or such general guardian is competent to protect the rights of the infant, and that he has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of any party to the proceeding. Where the application for the appointment of a special guardian is made by another than the infant, or where the general guardian appears in behalf of the infant, it must appear that such applicant or general guardian has no interest adverse to that of the infant. If such applicant or general guardian is entitled to share in the distribution of the estate or fund in which the infant is interested, the nature of the interest of such applicant or general guardian must be disclosed. The application for the appointment of a special guardian, as well as the appearance filed by a general guardian of a minor, must in every instance disclose the name and residence and relationship to the infant of the person with whom the infant is residing, whether or not he



has a parent living, and, if a parent is living, whether or not such parent has knowledge of, and approves, such application or appearance; and such knowledge and approval must be shown by the affidavit of such parent. If the infant has no parent living, like knowledge and approval of such application or appearance by the person with whom the infant resides must be shown in like manner. Where such application is made by an infant over the age of 14 years, his petition must show and be accompanied by the affidavit of the parent (in case the latter has an interest adverse to that of the infant), showing, in addition to such knowledge aforesaid, that such parent has not influenced the infant in the choice of the guardian.

**RULE 11.** In any judicial accounting, wherein a special guardian shall appear to protect the interests of an infant party to such accounting, no decree will be entered as upon default against such infant, but such decree shall be so entered only on the written report of the guardian appearing for such infant that he has carefully examined the account and finds it correct.

**RULE 12.** Whenever an infant interested in any proceeding in said Surrogate's court has a general guardian, no decree will be entered without appointing a special guardian to represent said infant's interest therein, unless such general guardian shall file his appearance in writing with the clerk of said Surrogate's court.

**RULE 13.** No costs will be allowed to the petitioner who takes proceedings to compel the filing of an inventory by an executor or administrator unless such executor or administrator shall have unreasonably delayed to make and file such inventory, after having been duly requested to do so by, or in behalf of, the petitioner.

**RULE 14.** All petitions and answers in this court, except as otherwise expressly prescribed by statute, shall be in writing, and contain a plain and concise statement of the facts constituting the claim, objection or defense, and a de-

mand of the decree, order or other relief to which the party supposes himself to be entitled, which petition and answer are required to be verified.

**RULE 15.** The deposit of securities for the payment of money belonging to an estate or fund, as provided in section 2595 of the Code of Civil Procedure, for the purpose of reducing the bond of an executor, administrator or other trustee, shall be made under the order of the Surrogate in the United States Trust Company, the New York Life Insurance and Trust Company, Farmers' Loan and Trust Company, the Union Trust Company, the Mercantile Trust Company, and the Central Trust Company of New York, subject to the order of the trustee, to be countersigned by the Surrogate, and not otherwise.

**RULE 16.** The respondent, on any appeal from a decree or order of this court, may, within ten days after the filing of the undertaking required on such appeal, serve upon the attorney for the appellant a written notice that he excepts to the sufficiency of the sureties therein; whereupon, and within ten days thereafter, such sureties, or other sureties in a new undertaking to the same effect, must justify before the Surrogate or his chief clerk, on five days' notice of such justification, to be served upon the respondent's attorney, by each surety appearing in person before said Surrogate or chief clerk, and submitting to an examination, on oath, on the part of the appellant, touching his sufficiency. If such sureties shall be found sufficient, said Surrogate or chief clerk will indorse an allowance thereof upon the undertaking or a copy thereof, and a notice of such allowance shall be served upon the attorney for the exceptant; and the effect of any failure to so justify and procure such allowance shall be to avoid the undertaking.

**RULE 17.** Wherever a bond with sureties shall be executed by an executor, administrator, guardian or other trustee, any person interested in the estate or in behalf of such guardian may apply to the Surrogate for an order requiring the sure-

ties in said bond to appear before him, or his chief clerk, and submit to an examination under oath as to their sufficiency as such sureties. If it shall appear to the satisfaction of the Surrogate that such examination is necessary, he will make an order, prescribing the time and place, where such examination shall take place, a copy of which order shall be served upon such executor, administrator, guardian or trustee, at least five days before the time fixed for such examination. If on such examination the Surrogate or chief clerk shall be satisfied of the sufficiency of such surety he will indorse his approval upon the bond, or a copy thereof; and in case such surety on such examination shall not, in the opinion of the Surrogate or chief clerk, be sufficient, the Surrogate will make an order requiring the substitution of new sureties, within five days after the service of a copy of said order upon the executor, administrator, guardian or other trustee, or his attorney, if he shall have appeared by attorney on such examination.

**RULE 18.** No document, petition, affidavit or paper will be considered on the determination of any motion by the Surrogate, except such as shall bear the regular file mark of the Surrogate, his chief clerk or the clerk to the Surrogate's court, except such as shall form part of the testimony or documentary evidence or exhibits before a referee, and then they must bear the mark as an exhibit of the referee. No paper will be received for consideration by the Surrogate, or for filing in his office, unless it is of the weight prescribed by rule 19 of the General Rules of Practice, and conforms in all other respects, as far as practicable, to the requirements of said rule. And no paper will be received by the clerk of the court after argument or submission of a matter subsequent to the day fixed by the Surrogate for the receipt of the same.

**RULE 19.** A proposed order or decree must not be attached to any other paper. Upon the back of every such order or decree, and upon every set or collection of papers attached

together, and upon all single papers separately presented, there must conspicuously appear the name of the decedent or of the infant to whose estate the proceeding relates, the nature of each order, decree or other paper, or set of papers, and the name and address of the attorney presenting the same.

**RULE 20.** No record nor paper on file in this court will be intrusted to the custody of the attorneys or parties, except for the purpose of proper examination, in the office where they are deposited ; and if any such document or paper shall be needed before any referee appointed by this court, the same shall be intrusted to a clerk or messenger of this court and delivered to the referee, who shall execute a receipt therefor, and for its re-delivery.

**RULE 21.** The Surrogate, on the written certificate of the person appointed under section 2844 of the Code to examine the inventory and accounts of guardians filed in said Surrogate's office, that a general guardian has omitted to file such inventory or account, or the affidavit required by section 2843, or that the interest of the ward requires that the guardian should render a more satisfactory inventory or account, will make an order requiring the guardian to supply the deficiency. Whenever it shall appear by the certificate of said person that the guardian has failed to comply with such order within three months after its due service upon him, or that there is reason to believe that sufficient cause exists for the guardian's removal, the Surrogate will appoint a special guardian of the ward for the purpose of filing a petition in his behalf and prosecuting the necessary proceedings for the removal of such guardian.

**RULE 22.** Whenever a party to a decree shall deem himself entitled to costs, the same will be considered and determined by the Surrogate, on two days' notice of adjustment, to be served upon the opposing party, with the items of costs and disbursements to which the party may deem himself entitled at the time of the settlement of the decree, which

disbursements shall be duly verified, both as to their amount and necessity; and at the same time, and on like notice, the Surrogate will pass upon any additional allowance to be made to an executor, administrator, guardian or testamentary trustee, upon a judicial settlement of his account; which notice of adjustment and allowance shall be accompanied by an affidavit, setting forth the number of days necessarily occupied in the hearing or trial, the number necessarily occupied in preparing the account for settlement, and in the preparation for the trial, the time occupied on each day in the rendition of the services, and their nature and extent in detail. In case such trial shall have been had before a referee, the time necessarily occupied in such trial before him may be shown by a certificate of such referee. The affidavit as to disbursements, time engaged in trial, and in preparing the account and for trial may be controverted by affidavit.

**RULE 23.** All motions for re-argument must be submitted on papers, showing clearly that some question decisive of the case, and which was presented by counsel upon the argument, has been overlooked by the court; or that the decision is inconsistent with some statute, or with a controlling decision, to which the attention of the court was not drawn through the neglect or inadvertence of counsel.

**RULE 24.—1.** Every proposed decree must be accompanied by an affidavit of regularity, setting forth the necessary jurisdictional facts. A copy of the form of the affidavit required will be furnished by the clerk of the court.

2. Every consent, notice of settlement or admission of service, must be upon a separate sheet of paper annexed to the order or decree to which it relates, and not upon the body or cover thereof.

3. When a petition for a voluntary accounting is presented, the account to which it relates must be filed therewith.



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## ABATEMENT OF LEGACY.

Decedent, by his will, whereby he undertook to dispose of \$86,000, gave *inter alia*, to the executors \$45,000 in trust to invest, and apply the income to the use of his widow, A., for life; of this fund, at her death, \$35,000 to go to a son, J., the balance being directed to be held on another trust for a life, at whose expiration, the principal to go to J. The will also gave to A. \$1,000 absolutely, and directed that "the above bequests for the benefit of my wife are not to be diminished," in case the estate proved inadequate to satisfy all the dispositions. The entire estate yielding only \$28,000, whereof A. had the enjoyment, as *cestui que trust*, for life, it was, upon her death,—*Held*, that the \$1,000 legacy should be paid, in full, to A.'s representative; and the provisions in favor of all the other beneficiaries be subjected to proportional abatement. *Matter of Morris*, 304.

## ABSENCE.

See DEATH, 1.

## ACCOUNTING.

1. Testator by his will, gave certain real property to a trustee, with directions to pay, out of the rents, an annuity and the dower right of his wife, and what remained, during the lifetime of the annuitant and wife, to his heirs at law, and, after the death of the life beneficiaries, to sell the property and pay the proceeds to his heirs at law. The trustee having died, the heir, before a successor was appointed, collected the rents, appropriated the same to his own use, omitted to pay the amounts due to the widow, and died. Upon the settlement of the account of the trustee's successor,—*Held*, that the widow's claim, arising out of such appropriation was not against the trust estate, and, if disputed by the heir's representatives, was enforceable only in another tribunal. *Matter of Baker*, 271.

2. Upon an application for an allowance for "preparing for trial" of the issues raised in proceedings for the judicial settlement of an account,

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the court must be furnished with the detailed information prescribed by the rules, in order to enable it to exercise the discretion wherewith it is invested by the statute. *Matter of Willett*, 435.

See COSTS, 2; DISPUTED CLAIM, 1, 2; EXPENSES OF ADMINISTRATION, 2; OBJECTIONS; PARTIES, 2; STATUTE OF LIMITATIONS; VOUCHERS.

#### ACKNOWLEDGMENT.

See SALE OF REAL ESTATE, 4.

#### ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS.

#### ADMINISTRATOR WITH WILL ANNEXED.

In selecting a person to act as administrator, with the will of a decedent annexed, the provisions of 2 R. S., 75, § 83,—which prefers the guardian of a minor, entitled, to “creditors and other persons,”—are to be regarded, in connection with Code Civ. Pro., § 2643. Therefore, the general guardian of an infant sole residuary legatee, “being in all respects competent,” is absolutely entitled to letters of administration, *c. t. a.*, where the person nominated executor is dead. *Matter of Tyler*, 48.

See OFFICIAL BOND, 3.

#### ADOPTION.

W. was an “adopted child” of decedent, within the terms of the act of 1887 (ch. 713). The latter having died September 9th, 1886, leaving a will whereunder W. took an interest of the value of more than \$500,—*Held*, that the legacy tax, on W.’s estate, became due and payable on the date mentioned; and that the right of the State, thus fixed and vested, remained unaffected by the passage of the act of 1887. *Warmer v. People*, 211.

#### AFFIDAVIT.

See NEW TRIAL.

#### AFTER-BORN CHILD.

1. The provisions of 2 R. S., 65, § 49, as amended in 1869, respecting the rights of an “after-born” child of a “testator,” must be deemed to apply where the will is that of the mother of the one invoking the protection of the statute. *Matter of Huiell*, 352.
2. Where an alleged will of a decedent is contested by a child born after its execution, the Surrogate’s court has jurisdiction to determine whether



the latter is "unprovided for by any settlement," within the meaning of 2 R. S., 65, § 49. Only in case such issue is determined in the negative, has contestant any *status*, as an opponent of probate. *Id.*

## AGENT.

1. An executor or administrator may, where peculiar circumstances render such employment suitable, be allowed credit for disbursements representing moneys paid to an agent employed to collect debts, even though the debts prove bad. *Matter of Ingersoll*, 184.
2. An executor or administrator has authority, where the circumstances of the estate render such a course reasonable, to employ an agent in the management of its affairs; and such agent may be also the legal adviser of the representative. *Matter of White*, 375.

See NON-RESIDENT EXECUTOR.

## ALABAMA CLAIM.

See ASSETS, 1, 2, 3.

## ALTERATION OF WILL.

See EXECUTION OF WILL, 4; INTERLINEATIONS, 1, 2, 3.

## AMENDMENT.

The test of the propriety of allowing an amendment of process, asked for, under Code Civ. Pro., is—to inquire whether the character of the action or special proceeding will be thereby changed; if not, and the proper parties in interest have had due notice, any amendment may be made in the names or description of parties which will conform to the intention manifested in the pleadings. *Matter of Soule*, 137.

See REVOCATION OF PROBATE, 1, 2.

## AMENDMENT OF STATUTE.

See COLLATERAL INHERITANCE TAX, 9, 10, 16, 17.

## ANNUITY.

See LEGACY, 1.

## ANSWER.

See DISCOVERY OF ASSETS, 2, 3.

## APPEAL.

1. Under Code Civ. Pro., §§ 1312, 1351, the mere pendency of an appeal, taken

by an executor from a judgment rendered against him in his representative capacity, is no bar to a motion, made by the creditor under id., § 1825, for leave to issue execution. *Matter of Morey*, 287.

2. Where contestant of a will appealed, from a decree admitting the same to probate, to the general term, which reversed the decree and directed a trial in the Common Pleas, where proponent obtained a verdict, which was certified to the Surrogate's court, no motion for a new trial having been made,—*Held*, that the latter court could not award to proponent costs of the appeal. *Matter of Hatten*, 444.

#### APPEARANCE.

See DECREE; JURISDICTION, 3.

#### APPORTIONMENT OF INTEREST.

See WILL, 1.

#### APPORTIONMENT OF LEGACY.

The only dispositive provision of testator's will directed the "executors and executrix to distribute and apportion to my (his) wife and children my (his) estate, *in such manner*," and at such time as they judged to be for the best interests of his wife and children, with power to sell, and distribute the proceeds as they should deem best for the interests of all. The widow and three of the children were nominated executrix and executors. The remaining three children were infants.—*Held*, that the beneficiaries were entitled to equal shares of the estate. *Matter of Conner*, 356.

#### APPRAISAL.

See COLLATERAL INHERITANCE TAX, 11, 20.

#### ASSETS.

1. Money awarded by the Alabama Court of Claims, under the act of Congress, passed in 1882, on account of an "indirect claim," founded upon the payment of war-premiums for insurance, is to be deemed a gratuity to the claimant, and is protected from the demands of his creditors. *Matter of Cooley*, 77.
2. Where such money is, in fact, received by the administrator of the estate of an intestate claimant, it does not constitute assets of the estate, and is not applicable to the payment of the decedent's debts. *Id.*
3. A Surrogate's court cannot, however, in such a case, direct payment thereof by the administrator to the relatives entitled. Their remedy is a civil action against him, for moneys had and received. *Id.*

See DISCOVERY OF ASSETS; MARSHALING OF ASSETS; PENSION MONEY; PUBLIC ADMINISTRATOR.

ATTESTATION CLAUSE.

See EXECUTION OF WILL, 2.

ATTORNEYS AND COUNSELLORS.

See AGENT, 2.

BEQUEST.

See LEGACY; SPECIFIC LEGACY.

BONA FIDES.

See COSTS, 3, 4; OBJECTIONS.

BOND.

See OFFICIAL BOND.

BURDEN OF PROOF.

1. The proponents, on applying for probate of a will, called but one witness, a stranger to decedent, who was the only survivor of the subscribing witnesses, and who, after testifying to the formalities of execution, and that decedent understood the provisions of the instrument, stated that she was of unsound mind at the time; and then rested. Thereupon contestants moved to dismiss the proceedings, for failure to prove mental competency.—*Held*, that the motion must prevail. *Ramsdell v. Viele*, 244.
2. Where an alleged will has been prepared, or its execution procured, by one interested in its dispositions, the ordinary burden of proof resting upon a proponent is increased by reason of the suspicion, which the law indulges, that the instrument may express the wishes of the beneficiary, rather than those of the decedent. *Peck v. Belden*, 299.

See DEATH, 2; EXPENSES OF ADMINISTRATION, 4; TESTAMENTARY CAPACITY, 1, 2; UNDUE INFLUENCE, 2.

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 Morse v. Scott, 4 *Dem.*, 507—distinguished. *Matter of Vedder*, 92.  
 Nash v. White's Bank of Buffalo, 105 *N. Y.*, 243—compared. *Kissam v. People*, 171.

- Pullman v. Willets*, 4 Dem., 536—followed. *Matter of Ingersoll*, 184.  
*Purdy v. Hayt*, 92 N. Y., 446—compared. *Orphan Asylum v. White*, 201.  
*Schell v. Hewitt*, 1 Dem., 249—compared. *Matter of Hatten*, 444.  
*Sisters of Charity v. Kelly*, 67 N. Y., 415—distinguished. *Sterens v. Stevens*, 262.  
*Smith v. Edwards*, 33 N. Y., 92—distinguished. *Matter of Farmer*, 433.  
*Taft v. Marsily*, 47 Hun, 175—followed. *Matter of Cooley*, 77.  
*Tift v. Porter*, 8 N. Y., 516—distinguished. *Matter of Hastings*, 307.  
*Valentine v. Valentine*, 3 Dem., 597—approved. *Matter of White*, 375.  
*Van Guysling v. Van Kuren*, 35 N. Y., 70—compared. *Matter of Vedder*, 92.  
*Warner v. Durant*, 76 N. Y., 133—followed. *Matter of Farmer*, 433.  
*Williams v. Seaman*, 3 Redf., 148—discussed. *Barker v. Southerland*, 220.  
*Wolfe v. Lynch*, 2 Dem., 610—doctrine reasserted. *Cromwell v. Phipps*, 60.  
*Worthington v. Kleim*, 144 Mass., 167—approved. *Will of Crumb*, 478.

CERTIFICATE OF DEPOSIT.

See PENSION MONEY.

CHARGE ON REALTY.

See LEGACY, 3; SALE OF REAL ESTATE, 1, 2.

CHARITABLE BEQUESTS.

See SUSPENSION OF OWNERSHIP, 3; UNDUE INFLUENCE, 5; WILL, 4, 7.

CHARITABLE CORPORATION.

See COLLATERAL INHERITANCE TAX, 8; JURISDICTION, 2

CITATION.

See AMENDMENT; REVOCATION OF PROBATE, 1.

CODE OF CIVIL PROCEDURE.

[Sections construed or cited.]

- § 40. *Hopkins v. Lane*, 12.  
 § 721. *Matter of Bowne*, 51.  
 § 721. *Matter of Soule*, 137.  
 § 813. *Matter of Thompson*, 56.  
 § 829. *Todd v. Dibble*, 35.  
 § 829. *Matter of Vedder*, 92.

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- § 841. *Cromwell v. Phipps*, 60.
- § 870. *Matter of Delaplaine*, 269.
- § 872. *Matter of Delaplaine*, 269.
- § 1312. *Matter of Morey*, 287.
- § 1351. *Matter of Morey*, 287.
- § 1825. *Matter of Morey*, 287.
- § 1865. *Matter of Ruser*, 31.
- § 1865. *Matter of Paine*, 361.
- § 2268. *Union Trust Co. v. Gage*, 358.
- § 2481. subd. 6. *Hopkins v. Lane*, 12.
- § 2496. subd. 1, 3. *Hopkins v. Lane*, 12.
- § 2517. *Matter of Soule*, 137.
- § 2517. *Matter of Phalen*, 446.
- § 2547. *Matter of Delaplaine*, 269.
- § 2554. *Union Trust Co. v. Gage*, 358.
- § 2555. *Union Trust Co. v. Gage*, 358.
- § 2557. *Matter of Whelan*, 425.
- § 2557. *Matter of Selling*, 428.
- § 2558. *Matter of Hatten*, 444.
- § 2560. *Matter of Hatten*, 444.
- § 2562. *Jenkins v. Shaffer*, 59.
- § 2589. *Matter of Hatten*, 444.
- § 2620. *Matter of Dockstader*, 106.
- § 2620. *Worden v. Van Gieson*, 237.
- § 2621. *Matter of Ruser*, 31.
- § 2623. *Ramsdell v. Viele*, 244.
- § 2643. *Matter of Tyler*, 48.
- § 2647. *Hopkins v. Lane*, 12.
- § 2648. *Matter of Soule*, 137.
- § 2649. *Matter of Phalen*, 446.
- § 2685. *Quin v. Hill*, 39.
- § 2706. *Matter of Nay*, 346.
- § 2710. *Estate of Hastings*, 423.
- § 2710. *Estate of Masterton*, 460.
- § 2717. *Adams v. Glidden*, 197.
- § 2717. *Hitchcock v. Wiltzie*, 255.
- § 2729. *Adams v. Glidden*, 197.
- § 2734. *Rose v. Rose*, 26.
- § 2743. *Adams v. Glidden*, 197.
- § 2749. *Smith v. Coup*, 45.

- § 2749. *Cromwell v. Phipps*, 60.
- § 2749. *Matter of Rider*, 478.
- § 2750. *Matter of Haig*, 454.
- § 2778. *Matter of Haig*, 454.
- § 2815. *Matter of Lawrence*, 342.
- § 2846. *Quin v. Hill*, 89.

## CODICIL.

Decedent, by her will, made certain dispositions in favor of her husband, as follows: (1) she bequeathed to him certain jewelry and apparel; (2) gave him "\$1,700, absolutely," stating that this sum represented a gift from him, and that she did not consider it a part of her estate; (3) gave him "\$2,000, absolutely"; (4) gave \$8,000 to the executors, in trust to invest, etc., and pay the "interest and income," to him, for life,—remainder over; and (5) directed that, if he were living when her son, H., attained majority, the executors take \$10,000 out of the principal of the share of H., invest the same, etc., and pay the "interest and income" to the husband, for life,—remainder over. A codicil read as follows: "I hereby revoke any bequest of money or interest of money made in my last will and testament to my husband, excepting the interest at 6 per cent. of \$10,000 during his lifetime, and the sum of \$2,000 which, as I have stated in my will, I consider a gift from him," etc. It was contended that the "exception" in the codicil operated as a revocation, *in toto*, and effected a new and substantive bequest. — *Held*, that the codicil, though not precise in its descriptions, must be held to revoke all the pecuniary bequests to the husband, except the third, and the last, in the foregoing enumeration. *Flagg v. Harbeck*, 289.

## COLLATERAL INHERITANCE TAX.

1. A legatee, or a distributee of the property of an intestate, whose legacy or share is less than \$500 in value, is, upon that ground, exempt from the tax imposed upon the passing of certain property, by L. 1885, ch. 483. The word, "estate," in the clause of § 1 of that act, as amended by L. 1887, ch. 713, providing that an "estate which may be valued at a less sum than five hundred dollars shall not be subject to such duty or tax," refers to the interest of the taker. *Matter of Hopkins*, 1.
2. Decedent, by her will, bequeathed the residue of her estate, amounting to more than \$6,000, to the executor, in trust, to convert and invest, and pay the net income to P., her brother, for life, with discretionary power to expend from \$200 to \$300 of the principal annually, for P.'s support; remainder to distant relatives.—*Held*, that a tax upon the remainder could not be fixed or recovered during P.'s lifetime. *Id.*
3. The exemption from taxation, extended by the "act to tax gifts, lega-

- cies," etc. (L. 1885, ch. 483), to a devise or bequest in favor of the "husband of a daughter" is unaffected by the circumstance of the death of the latter occurring before that of the testator, her parent. *Matter of McGarvey*, 145.
4. Where a will makes a bequest to one for life, with remainder over, all the beneficiaries being in the category of those whose interests are subject to the tax imposed by the "collateral inheritance tax" act, L. 1885, ch. 483, the tax on the life estate is to be taken out of the income, and that on the remainder to be deducted from the principal. The fact that the amount of the latter will thus be reduced is no objection, since such reduction is lawfully made. *Matter of Johnson*, 146.
  5. Where the interest of the life beneficiary is not taxable, the amount of the remainderman's tax is nevertheless lawfully payable out of the principal. *Id.*
  6. The expression "societies, corporations and institutions now exempted by law from taxation," contained in L. 1885, ch. 483 (as amended in 1887), implies an immunity from taxation, expressly granted by statute, and not a mere omission to tax. *Church Charity Foundation v. People*, 154.
  7. Those societies, corporations and institutions are to be deemed "exempted by law from taxation," within the meaning of the act cited, whose property is so exempted. *Id.*
  8. A corporation organized to establish and maintain (1) houses for the maintenance of indigent aged persons and the support and education of destitute children, and (2) hospitals and dispensaries for the shelter and relief of the infirm, sick and needy, which is maintained by voluntary gifts, has no capital stock, and carries on no business,—is exempt, as legatee, from the "collateral inheritance tax," being protected as, in effect, an alms-house, poor-house, school-house, or combination thereof, by chapter xlii. of part 1st of the Revised Statutes, treating "of the assessment and collection of taxes." *Id.*
  9. The act, L. 1887, ch. 713, amending the "collateral inheritance tax" act (L. 1885, ch. 483) is not retroactive so as to govern, in the assessment and collection of a tax on interests passing under the will of a decedent dying before it took effect. *Matter of Brooks*, 165.
  10. As to whether any tax, upon the passing of property under the will of a decedent dying before the date of the passage of the act, L. 1887, ch. 713, can be collected in proceedings instituted after that date—*quære*. *Kissam v. People*, 171.
  11. It seems, to be primarily the duty of an executor to apply for an appraisal of interests passing by the will of his decedent, taxable under the "collateral inheritance tax" act. The power given to the Surrogate, of his own motion to cause an appraisal to be made, and to fix the tax, was not intended to relieve personal representatives of this obligation. *Frazer v. People*, 174.
  12. No "collateral inheritance tax" is payable upon the passing of real



property, situated without the State of New York, under a devise contained in the will of a resident. *Lorillard v. People*, 268.

13. The final clause of the first section of the "Act to tax gifts, legacies and collateral inheritances in certain cases,"—L. 1885, ch. 483, as amended by L. 1887, ch. 713,—whereby it is "provided that an estate which may be valued at a less sum than five hundred dollars shall not be subject to such duty or tax," operates to relieve from the excise a testamentary beneficiary, or a distributee in intestacy, who takes an interest of a value less than \$500; and does not refer to the estate of the testator or ancestor. *Matter of McCready*, 292.
14. An executor who has paid a "collateral inheritance tax," upon a legacy to an infant, with the knowledge and consent of his general guardian, cannot on a subsequent accounting, be held liable, at the instance of a guardian *ad litem*, for the amount so paid, upon the ground of an alleged exemption. *Farquharson v. Nugent*, 296.
15. A decree of a Surrogate's court assessing a tax upon the passing of property, under the "collateral inheritance tax act" (L. 1885, ch. 483), is confirmatory of the right of the People of the State, created by the statute, and establishes an additional right—that of recovery—by virtue of itself. *Matter of Miller*, 119.
16. Such a decree cannot be vacated, as having been inadvertently made, upon a motion based on a change in the law effected by a statute passed after the rendering of the decree, and before payment of the tax. *Id.*
17. Upon a state of facts arising between the dates of the passage of the "act to tax gifts, legacies," etc. (L. 1885, ch. 483), and of the subsequent act, L. 1887, ch. 713, the law continues as if the latter statute had not been enacted. *Warriner v. People*. 211.
18. The practice to be observed under the "collateral inheritance tax" law (L. 1887, ch. 713, amending L. 1885, ch. 483), in the Surrogate's court of New York county—announced. *Matter of Astor*, 402.
19. As to whether the "estate which may be valued at a less sum than five hundred dollars," declared not subject to tax by section 1, is that of the decedent or of his successor—*quære*. The Surrogate is deemed the superior authority upon all questions, including that of value of the estate subject to the tax. *Id.*
20. The order of the Surrogate, appointing an appraiser, will designate the persons upon whom the latter shall forthwith serve notices by mail; who will include all persons interested in the whole estate. The Surrogate will not take any steps, upon his own motion, until the expiration of eighteen months after the decedent's death. In case of a will, under which the legacies subject to the tax are in cash, the appointment of an appraiser is deemed unnecessary. *Id.*
21. The "societies, corporations and institutions now exempted by law from taxation," referred to in the "act to tax gifts, legacies and collateral inheritances in certain cases" (L. 1885, ch. 483; L. 1887, ch. 713),

do not include foreign bodies owing their immunity from taxation to foreign laws. *Matter of McCoskey*, 438.

See ADOPTION; COSTS,

### COMMISSIONS.

1. Where two or more persons are nominated executors in a will, and one of them, alone, qualifies, receives full commissions as executor, and dies,—and thereafter another of the nominees, receives letters and acts, the latter is entitled, in like manner as an administrator *de bonis non*, to full commissions on moneys received and paid out by him, and half-commissions on moneys received and held. The case appears to be unprovided for by statute. *Matter of Depew*, 54.
2. No commissions accrue upon a specific legacy, although the article bequeathed has been sold, and the price collected and paid over by the executor, with the approval and by the direction of the legatee. *Farquharson v. Nugent*, 296.
3. The amount of commissions due to an executor and trustee, at the expiration of a trust administered by him pursuant to directions contained in the will—determined. *Matter of Morris*, 304.

### CONDITION PRECEDENT.

See VESTING, 3.

### CONSTRUCTION OF WILL.

See INTERPRETATION OF WILL; WILL.

### CONTEMPT.

1. A witness cannot be punished for a contempt, for refusing to answer a question immaterial and irrelevant to the issue upon the trial whereof he is examined. *Matter of Odell*, 344.
2. A Surrogate's court cannot enforce a direction for the payment of money by proceedings to punish for contempt, until after the return, unsatisfied, of an execution against the property of the alleged delinquent (Code Civ. Pro., §§ 2554, 2555). *Union Trust Co. v. Gage*, 358.
3. Personal service of a copy of an order directing the payment of money, is not a "personal demand" of payment, within the meaning of Code Civ. Pro., § 2268, which permits a warrant of commitment to issue, in certain cases, where such a demand has been made, and payment neglected or refused. *Id.*

### CONTINGENT REMAINDER.

1. A contingent remainder or future estate is authorized by the Revised

Statutes, and is valid even although, by the terms of its creation, the first taker is permitted to dispose of the whole, during his lifetime, for purposes other than his maintenance, and thus by his volition defeat the expectant estate. *Simpson v. French*, 108. ....

2. The will of testatrix devised to her husband, J., all her real property, "to do with as he shall think best"; bequeathed to him all her personal property, without any terms of restriction, declaring that she wished her "said husband to do with said property as he shall think best during his lifetime, without any let or hindrance from any source whatever"; gave to a daughter, F., \$8,000, to be paid out of her real and personal estate, at and after J.'s death, "provided there be that amount" in J.'s hands at his decease; and finally repeated that J. might use so much of her real and personal estate as he might wish, during his lifetime, and that, at his death, if \$8,000 remained in his hands, that amount should be paid to F., or, if the residuum proved to be less, that F. then have whatever so remained, "to do with as she shall think best." J. died shortly after his wife, never having taken possession of, or used any of the property, so devised and bequeathed to him, and leaving a will whereby he gave his entire estate in equal shares, to F. and another daughter.—*Held*, 1. That the intention of testatrix was to give to J. a right to use her estate, not merely for his maintenance, but at pleasure, even to its utter exhaustion, during his lifetime, but no power to dispose thereof by will. 2. That her will, accordingly, created a contingent remainder, in favor of F., which was valid under 1 R. S., 725, §§ 32, 33, and *id.*, 773, § 2; and, the defeating contingency having been rendered impossible by the death of the first taker, the remainderman had the right of immediate possession. *Id.*

#### CONVERSION.

See DEVASTAVIT.

#### CORPORATION.

See COLLATERAL INHERITANCE TAX, 6, 7, 8.

#### COSTS.

1. Four days before the expiration of the period of eighteen months after the death of testatrix, who died November 27th, 1886, the executors paid the "collateral inheritance tax," assessed upon a life estate and remainders, passing under the will. About a month before such payment, the district attorney instituted proceedings to compel such payment.—*Held*, 1. That, there having been no "refusal or neglect" to pay the tax, within the meaning of L. 1887, ch. 713, § 17, costs should not be awarded against the executors. 2. That there was probable cause for instituting the proceedings, and the district attorney was entitled to a certificate under *id.*, § 19. *Frazer v. People*. 174.

2. The administrator of intestate's estate, who was a private banker, paying no interest on deposits, and kept the funds of the estate, which was small in amount and difficult in settlement, in his own bank,—on filing his account, omitted to charge himself with interest. Objections having been interposed, and a brief hearing had, the court required the payment of interest, but, it appearing that the accounting party had acted in good faith, and that his remuneration was an inadequate reward for the services rendered,—*Held*, not a proper case for charging him personally with the costs of the accounting. *Walker v. Dow*, 265.
3. In probate cases, the court in N. Y. county will, under the authority conferred by Code Civ. Pro., § 2557, mulct a contestant in costs, who is not characterized by *good faith* in his opposition. *Matter of Whelan*, 425.
4. *Good faith*, in the respects referred to, declared to imply, not only an earnest, honest belief in the justice of one's claim, but also the conscientious exercise of reasonable business judgment, which should induce the party to avoid needless delay and expense by taking advantage of his opportunity and right to attend and cross-examine the subscribing witnesses on the return of the citation. *Matter of Whelan*, 425.

See ACCOUNTING, 2; APPEAL, 2; OBJECTIONS; REFERENCE.

#### COUNSEL FEES.

A guardian ad litem, in a Surrogate's court, will employ counsel at his own expense. *Matter of Johnston*, 355.

#### CROSS REMAINDERS.

See WILL, 4.

#### CURTESY.

See SALE OF REAL ESTATE, 4.

#### DEATH.

1. The proof of absence for seven years or more, requisite to found a presumption of death, under Code Civ. Pro., § 841, need not be direct and positive; but such absence may be fairly inferred from facts which clearly point to that conclusion. *Cromwell v. Phipps*, 60.
2. The decree admitting a will to probate, being evidence, against the parties, of the testator's death, the fact of such death, when controverted, is one of the issues before a Surrogate's court to which an alleged will is presented, and the burden of proof is on the proponent. The death, in such a case, cannot be proved by repute. *Prout v. McNab*, 152.

See EXECUTION OF WILL, 1; SALE OF REAL ESTATE, 6.

## DEBT.

See DISCOVERY OF ASSETS, 1; DISPUTED CLAIM, 2.

## DECLARATIONS.

Declarations of kinship, sought to be introduced in evidence, as a basis of a demand for the grant of letters of administration of a decedent's estate, to the alleged relative, must come within the rules, which require the declarant to have been a relative, since deceased, who knew or professed to know the facts stated from connection or acquaintance with the family, and whose relationship appears from evidence *aliunde*. *McCreedy v. Garbutt*, 252.

## DECREE.

A decree of a Surrogate's court, admitting or rejecting a will presented for probate, is "a judgment," within the meaning of Code Civ. Pro., § 721, which is made applicable to such a court by id., § 2538, and protects a "judgment of a court of record" from impairment, by reason of the appearance, by attorney, of an infant party, if the judgment be in his favor. But where the will is admitted, the decree cannot be said to be in favor of an infant contestant. *Matter of Bowne*, 51.

See COLLATERAL INHERITANCE TAX, 15, 16; RES ADJUDICATA.

## DEFINITIONS.

See AFTER-BORN CHILD ("TESTATOR"), 2; ASSETS, 1, 2; COLLATERAL INHERITANCE TAX ("ESTATE"), 1, 13, 19; ("EXEMPTED"), 6, 21; INSANE DELUSION, 3; PENSION MONEY ("ASSETS").

## DELUSION.

See INSANE DELUSION.

## DEVASTAVIT.

A portion of decedent's assets consisted of two Jersey City bonds, of the par value of \$1,000, each, which did not come into the executor's hands, but were taken by the residuary legatee, and sold, and the proceeds appropriated, by her. It appeared that the executor knew, during decedent's lifetime, and shortly before his death, of the ownership of the bonds, and was also aware, within a few months of the admission of the will to probate, of the existence of a liability on the part of decedent, for which the creditor afterward obtained judgment; also that the residuary legatee, who had the custody of decedent's effects, at the time of his death, repeatedly during six months denied having the bonds in her possession, sent the executor, in vain quests for them, to various persons and places, and finally confessed that she had sold them, stating that they had been given to her by decedent;

which last named statement the executor did not believe.—*Held*, that, in view of the indebtedness of the estate, the latter was guilty of neglect of a plain and urgent executorial duty in not taking prompt measures to recover the value of the property wrongfully converted; and that, by reason of his *devastavit*, he must be held liable for the amount of the bonds in question, as assets in his hands. *O'Connor v. Gifford*, 71.

#### DEVISE.

See COLLATERAL INHERITANCE TAX, 12; LEGACY.

#### DISBURSEMENTS.

See EXPENSES OF ADMINISTRATION, 1.

#### DISCOVERY OF ASSETS.

1. An executor or administrator cannot proceed to the collection of an ordinary debt, by means of the machinery provided by Code Civ. Pro., § 2706, *et seq.*, relating to the discovery of property concealed or withheld. *Matter of Nay*, 346.
2. In a special proceeding, instituted by executrix, under Code Civ. Pro., § 2706, to discover certain personal property alleged to belong to decedent, and to be in the possession of respondent, the latter filed an answer, setting forth "that the only chattels or property of any kind in the possession of this respondent were and are such ornaments which were, preceding the death of said" decedent, "given to this respondent by said decedent" . . . . . "and that the same is her own property; and that the said" executrix "has no title or interest therein; and that she has no books or papers or property of any kind belonging to said estate."—*Held*, insufficient to justify a dismissal of the proceedings. *Estate of Hastings*, 423.
3. An answer, interposed under Code Civ. Pro., § 2710, in a special proceeding instituted to discover property of a decedent withheld, etc., though inartificially and discursively drawn, may entitle the respondent to a dismissal of the proceedings, if the court is able to infer allegations of fact showing ownership, or title to the possession, of the property. *Estate of Masterton*, 460.

#### DISPOSITION OF REAL PROPERTY.

See SALE OF REAL ESTATE.

#### DISPUTED CLAIM.

1. The same formality is not required, for the disputation of a claim against a decedent's estate, where proceedings for a judicial settlement are instituted under Code Civ. Pro., § 2729, as where a petition for payment is presented under *id.*, § 2717. *Adams v. Glidden*, 197.

2. The effect of Code Civ. Pro., § 2743, which requires the decree, upon a judicial settlement of a representative's account, to make the determinations therein specified, "where the validity of a debt . . . . is not disputed," is to deprive the Surrogate's court of jurisdiction to determine a controversy, arising in such proceeding, between the accounting party and a third person seeking to enforce a claim against the estate. *Id.*

## DISTRIBUTIVE SHARE.

See STATUTE OF DISTRIBUTIONS.

## DOWER.

Testator's will contained a bequest to his wife, M., of certain leasehold property, in lieu of dower, and, after making other dispositions, gave the residue to his daughters. M. elected to take her dower instead of the leasehold, and claimed one third of the latter under the statute of distribution in case of intestacy.—*Held*, that the leasehold property fell into the residue. *Matter of Frost*, 431.

See WILL, 6.

## ESTATE.

See COLLATERAL INHERITANCE TAX, 1, 13, 19 ; CONTINGENT REMAINDER.

## EVIDENCE.

See DECLARATIONS; EXECUTION OF WILL, 5; KINSHIP; LOST WILL, 2.

## EXAMINATION BEFORE TRIAL.

After the removal of a probate proceeding from the Surrogate's court of New York county to the Court of Common Pleas, pursuant to Code Civ. Pro., § 2547, as amended in 1886, it is doubtful whether the Surrogate can vacate the order of transfer in order to entertain an application for an order for the examination, before trial, of a witness about to leave the State, although the latter tribunal has no power to direct the examination under Code Civ. Pro., §§ 870, 872. *Matter of Delaplaine*, 269.

## EXECUTION.

See APPEAL, 1; CONTEMPT, 2.

## EXECUTION OF WILL.

1. An alleged will, subscribed by decedent by making a cross-mark, and one of the two subscribing witnesses whereto is dead, may, where other essential circumstances appear, be admitted to probate upon the testimony of the living witness that he saw decedent make the mark, and

- proof of the handwriting of the other,—this being a compliance with Code Civ. Pro., § 2620, which requires “proof of the *handwriting* of the testator,” where “a subscribing witness whose testimony is required is dead.” *Matter of Dockstader*, 106. ....
2. The paper propounded as decedent's will, and which purported to have been executed by making a cross-mark, was accompanied by a full attestation clause, and was witnessed by the draftsman, since deceased, and another whose memory, as to the circumstances attending the publication, was a blank. No other evidence being adduced to show the making of the mark by decedent,—*Held*, that probate must be refused, for lack of proof. *Worden v. Van Gieson*, 237. ....
  3. *It seems*, that proof of the making of such mark by decedent would have been “proof of the handwriting of the testator,” within the meaning of Code Civ. Pro., § 2620. *Id.*
  4. Where a substantial portion of a will, as, *e. g.*, the clause appointing an executor, appears beneath the subscription of the testator, the question whether the will is invalid, or such clause surplusage, depends upon when the latter was inserted. *Matter of Jacobson*, 298.
  4. It is not absolutely requisite to the valid execution of a will, in all cases, that the instrument should be read to or by the testator. It is enough that the court be satisfied by competent and trustworthy evidence that the testator understood and approved all its provisions. So—*Held*, where it appeared that decedent had given specific directions to the draftsman, as to the contents of the will, of which the latter made a memorandum in decedent's presence, which memorandum was produced on the hearing and corroborated the testimony of the draftsman, that the instructions had been strictly followed. *Will of Crumb*, 478.

See INTERLINEATIONS.

#### EXECUTORS AND ADMINISTRATORS.

1. A temporary administrator cannot saddle upon his decedent's estate a fee paid by him to an indemnity company as the consideration for its going bail for him,—the expenditure being neither within the line of his duty as a prospective representative, nor necessary and reasonable, within the meaning of Code Civ. Pro., § 2562. *Jenkins v. Shaffer*, 59.
2. Upon the judicial settlement of executors' account, it appeared that certain creditors, whose claims the testator, in his will, had directed to be paid, had received more than the amounts specified in that instrument, but not more than was justly due.—*Held*, that the executors' course was justifiable. *Beecher v. Barber*, 129.

See AGENT; COMMISSIONS; DEVASTAVIT; EXPENSES OF ADMINISTRATION; MASSES FOR THE DEAD; NON-RESIDENT EXECUTOR;—  
OFFICIAL BOND; PUBLIC ADMINISTRATOR;  
RES ADJUDICATA; TENDER;  
VOUCHERS.



## EXEMPTION.

See COLLATERAL INHERITANCE TAX, 1, 3, 6, 7, 8, 13, 14, 19, 21.

## EXPENSES OF ADMINISTRATION.

1. An executor or administrator cannot charge for the use of his own horse and wagon, employed by him in collecting the assets of his decedent's estate; although his bill for livery expenses, when reasonable in amount; and necessarily incurred in the administration, will be allowed. *Matter of Ingersoll*, 184.
2. Decedent died in New Jersey, leaving assets in New York county, the Surrogate's court whereof granted letters of administration of his estate. Subsequently, a will was proved in a domiciliary court, and ancillary letters were issued, here, to the foreign executrix. Upon a settlement of the administrator's account,—*Held*, that credit should not be allowed for any disbursements representing expenses incurred in contesting the foreign probate. *Matter of Black*, 331.
3. Administrators, in such a case, being liable to be required at any time to pay over funds collected, will not be mulcted in interest as a penalty for not making investments. *Id.*
4. Where an executor or administrator, who has paid out money on account of expenses of administration, produces a voucher showing the nature of the disbursement and stating facts which, if true, show the same to have been reasonable, and necessary for the good of the estate, a presumption is raised in favor of the correctness of the charge, which must be opposed by affirmative evidence on the part of one contesting the demand for credit. *Matter of White*, 375.

See AGENT, 2; NON-RESIDENT EXECUTOR; RES ADJUDICATA.

## FALSA DEMONSTRATIO.

See CODICIL.

## FEES.

See COUNSEL FEES; OBJECTIONS.

## FOREIGN CORPORATION.

See COLLATERAL INHERITANCE TAX, 21; FOREIGN LEGATEE, 2.

## FOREIGN LEGATEE.

1. Where the will of a resident of this State is sufficient in form, and not repugnant in its dispositions to the *lex domicilii*, it will be sustained by our courts; and the capacity of a non-resident beneficiary, whether a natural or an artificial person, to take a bequest or devise therein

contained, will be determined by the law of the State of his residence. *Matter of Bullock*, 335.

2. The will of testator, who died domiciled in this State, bequeathed \$5,000 to "the congregational church in the town of S., in the county of W., and the commonwealth of Massachusetts," adding words further tending to identify the intended legatee. It appeared that there was a religious body, answering to the description, which, however, was not incorporated. But a local statute, in force when the will was executed, and still unrepealed, provided that certain designated officers of religious societies, which this church possessed, should be deemed bodies corporate, for the purpose of taking donations made to them or their respective churches.—*Held*, that the capacity of the church described to take the legacy was to be tested by the law of Massachusetts, and that the disposition in its favor was in all respects valid and effectual. *Id.*

#### FOREIGN WILL.

See EXPENSES OF ADMINISTRATION, 2.

#### FUTURE ESTATE.

See CONTINGENT REMAINDER.

#### GENERAL GUARDIAN.

See ADMINISTRATOR WITH WILL ANNEXED.

#### GENERAL LEGACY.

See LEGACY, 2.

#### GUARDIAN AD LITEM.

The parent of an infant party to a special proceeding in a Surrogate's court has no authority, in his capacity as guardian in socage or by nature, to appear as guardian ad litem for his ward. *Matter of Bowne*, 51.

See COUNSEL FEES; INFANT, 3.

#### HALF-BLOOD.

See STATUTE OF DISTRIBUTIONS.

#### HANDWRITING.

See EXECUTION OF WILL, 1, 2, 3.

#### HUSBAND AND WIFE.—

See COLLATERAL INHERITANCE TAX, 3; MARRIAGE;  
OFFICIAL BOND, 4. .

## ILLEGITIMATE CHILD.

1. As to whether, under L. 1855, ch. 547, the illegitimate child of a mother, who has died leaving a will executed before the birth of the former, has the same rights, in respect of such parent's property, as are accorded to lawful issue by 2 R. S., 64, § 43, and 2 R. S., 65, § 49,—*quære. Matter of Bunce*, 266.
2. The will of a testatrix so dying, is entitled to probate, although it contains no mention of, or provision for such child, and notwithstanding that the maker has failed to provide for the latter by settlement or otherwise. *Id.*

See INTEREST IN EVENT, 2.

## IMPLIED TRUST.

See WILL, 3, 7.

## INCIDENTAL POWERS.

See PROBATE OF WILL, 5.

## INCOME.

See INTEREST, 1, 2.

## INDEMNITY COMPANY.

See EXECUTORS AND ADMINISTRATORS, 1.

## INFANT.

1. While the natural guardian of an infant may petition, pursuant to Code Civ. Pro., § 2846, for an order directing the general guardian of the property of the infant to apply the same to the support and education of the latter, he cannot proceed against the executors to such an end. *Quin v. Hill*, 39.
2. Nor will a Surrogate's court direct the general guardian to pay over money, for the purposes indicated, to the natural guardian,—the latter not being amenable to the court for the proper disposition thereof. *Id.*
3. Seven years after decedent's will was admitted to probate, application was made for an order, to be entered, *nunc pro tunc*, appointing a guardian ad litem of an infant contestant, in the special proceeding instituted to procure probate.—*Held*, that the court was without jurisdiction to grant the order sought; the application for which was an attempt to forestall the infant's right, on attaining majority, to move to vacate the decree on account of the failure to procure an appointment of such a guardian in due course. *Matter of Bowne*, 51.

See DECREE; GUARDIAN AD LITEM.

## INSANE DELUSION.

1. Where an insane delusion is proved, the testator's mental capacity is to be

measured by the relations of the delusion to the testamentary act. *Matter of Vedder*, 92.

2. Upon an application for the admission to probate of the will of decedent, a married woman, executed about two and a half years before her death, which occurred at the advanced age of seventy-seven years, it was shown that her physical powers had been gradually failing; that she was miserly in disposition, and, at times, uncleanly in her habits; that, during the last quarter of a century, she had been a believer in witchcraft, frequently talked of buried treasures, had seen the headless horseman, gave absurd recipes and advice to others; pretended to have had personal interviews with the deity and the evil one, to have entered heaven and conversed with its inhabitants; and expressed a desire to be robed like the angels when she died:—While, on the other hand, it appeared that she was prudent and sensible in the management of her household affairs, shrewd at a bargain, a consistent church member, interested in religious work, and an affectionate wife; that the dispositions of her will were in accord with natural claims upon her bounty, and that, as the subscribing witnesses testified, she was rational at the time of execution.—*Held*, that the petition for probate should be granted. *Id.*
3. Two conditions are essentially prerequisite to the availing of a will on the ground of delusion entertained by the testator: (1) that it be an *insane* delusion; and (2) that it be shown to have affected the testamentary disposition. *Bull v. Wheeler*, 123.
4. In determining the question of the insanity of a delusion, regard must be had to the temperament and other personal peculiarities of the testator; since what might be mere eccentricities, in one person, would, in another, afford evidence of mental aberration. *Id.*
5. The evidence, on the subject of the insane delusion, alleged by contestant to have existed in the mind of testatrix, his sister, showed the same to consist of an unjust belief that the former had, in some way, obtained more than his fair share of their father's property, and had deprived her of privileges in the use of a horse and wagon, and in the garden, to which she was entitled under that parent's will. Testatrix, an unmarried woman, who died at the age of fifty-one years, was a person of feeble health and nervous temperament; had, in early life suffered from attacks of hysteria; possessed marked personal peculiarities, was of more than ordinary capacity, and active in religious matters. She was evidently actuated by an intense dislike of contestant, who was excluded from the number of her beneficiaries; but the proofs failed to show that her feelings could not have been changed by evidence that she was mistaken in her judgment concerning contestant's conduct.—*Held*, that the will must be sustained. *Id.*

#### INTEREST.

1. The rule allowing interest, from the date of a testator's death, on a bequest to a legatee, towards whom the former stood *in loco parentis*, is con-

ditioned upon the circumstances that the beneficiary be one for whom no other provision is made, and who, without such allowance, would be destitute of income during the period expiring at the end of a year from the grant of letters. It is not enough that an income, actually enjoyed, is insufficient for his support in a style which he may desire. *Morgan v. Valentine*, 18.

2. In order that an infant legatee, to whom the testator stood in *loco parentis*, be deemed entitled to interest from the death of the latter, it is sufficient that no other provision nor any maintenance, in the meantime, is *allotted by the will*. That the infant has extraneous means of support is immaterial. *Neder v. Zimmer*, 180.

See COSTS, 2; EXPENSES OF ADMINISTRATION, 3; TENDER; VESTING, 4.

#### INTEREST IN EVENT.

1. The *interest* which will render a person incompetent to "be examined as a witness" (under the rule established by Code Civ. Pro., § 829), as to conversations with the decedent, upon an application for the probate of a will, must be a present, certain and vested one; an interest uncertain, remote or contingent is not a ground of exclusion. *Todd v. Dibble*, 35.
2. In a special proceeding instituted to procure the admission to probate of the will of decedent, the right of his father to oppose was assailed by proponent, his widow, on the ground of want of interest, she contending that her infant daughter, H., was a lawful child of decedent, and as such entitled, in case intestacy should be established, to the entire estate, exclusive of proponent's share. There was evidence that, in 1878, decedent had been married to A., from whom he separated after a cohabitation of several years, without issue; in 1882, decedent became a resident of Connecticut and cohabited with proponent, who, in 1884, in that State, gave birth to H.,—whom decedent recognized as his daughter; in the same year, A. procured a divorce from decedent, in New York, the judgment containing the usual prohibition to marry; soon thereafter decedent and proponent were duly married, though not domiciled, in Pennsylvania, whereupon they returned to and resided in Connecticut, until decedent's death, in 1885.—*Held*, 1. That the marriage in Pennsylvania, being valid there, must be recognized as valid in this State. 2. That, the statutes of Pennsylvania and of Connecticut legitimizing a child, so born and recognized, of parents afterwards intermarrying,—H. was decedent's sole heir and next of kin, and contestant without standing in court, unless he could disprove the infant's alleged paternity. *Stack v. Stack*, 280.

#### INTERLINEATIONS.

1. The fact that an interlineation, in the body of a will, is not noted at the foot of the instrument, does not exclude the theory of its having been

made before execution, where other reasons exist for reaching that conclusion. *Matter of Voorhees*, 162.

2. Among interlineations in wills, are to be distinguished those which supply a blank in the sense, and those which indicate a change of intention on the part of the testator. The latter, only, are subject to the strict presumption of having been effected after execution. *Id.*
4. The will of testator, who died leaving, him surviving, two sons and three daughters, after certain bequests to grandchildren, provided: "I give unto my son Abraham and his heirs one equal fifth share of my real and personal estate; also Johana Jewell and heirs wife of Ditmas Jewell one fifth share of my real and personal also my son Wm. K. Voorhees and his heirs, one fifth share of my real and personal estate I give unto my daughter and her heirs one fifth of my real and personal estate; also Anna Maria Hegeman, wife of John J. Hegeman and heirs one fifth share real and personal estate." The interlineation was not noted at the foot of the will, which was in the handwriting of testator.—*Held*, that the will should be admitted to probate, with the interlineation as a constituent part thereof. *Id.*

See PROBATE OF WILL, 2.

#### INTERPRETATION OF STATUTE.

1. In dealing with statutes, it is the duty of a trial court, especially, to confine the exercise of its functions to strict interpretation, rather than to indulge in construction, bordering on the domain of legislation. *Matter of McCoskey*, 438.

#### INTERPRETATION OF WILL.

1. It appearing by evidence, when introduced, that, at the time of the execution of his will, it was true, and testator knew, that he alone owned a sufficient number of shares of stock described to satisfy certain bequests,—a like number thereof, other than his own, not being in existence;—and that during the period expiring at his death he not only parted with none of these shares but acquired others,—*Held*, that these facts were inconsistent with any interpretation of the will other than one involving an intention on testator's part to bestow, specifically, a portion of the very stock which he owned at the time of his death; and that the legatees of the stock took their ratable shares of the dividends, as the increment of specific legacies. *Matter of Hastings*, 307.
2. A legacy of "one thousand," without further words of description, will, for the purpose of determining the penalty of the official bond of a representative of decedent, be deemed to mean \$1,000, in view of the circumstance that the beneficiary's rights might be so adjudicated, in a proper proceeding, by a competent tribunal. *Matter of Nesmith*, 333.

See PROBATE OF WILL, 1.

INTERSTATE COMITY.

See FOREIGN LEGATEE, 1; INTEREST IN EVENT, 2.

ISSUES.

See LOST WILL, 3.

JUDGMENT.

See DECREE; WILL, 1.

JURISDICTION.

- A Surrogate is competent to entertain an application for probate of a will, although related by affinity within the sixth degree (Code Civ. Pro., § 46), to one designated a legatee therein,—the latter not being a party to the special proceeding. *Hopkins v. Lane*, 12.
3. The will of testator bequeathed "to the rector, church-wardens and vestrymen of S. P. Church," a religious corporation, five hundred dollars for a stained glass window, or a lectern and pulpit, "whichever the said rector," etc., "shall deem most suitable."—*Held*, that the Surrogate was not disqualified, by the fact that he was senior warden of the church in question, from sitting in the special proceeding instituted to procure probate of the will,—either under Code Civ. Pro., § 2496, subd. 1, as being "a devisee or legatee of any part of the estate, or under id., subd. 3, which disqualifies him only "where he is named as executor, trustee or guardian in any will or deed of appointment involved in the same matter." *Id.*
3. Voluntary appearance, in a Surrogates' court, of all the parties to a controversy does not confer power to determine the same, where the subject-matter is without its jurisdiction. *Matter of Cooley*, 77.
- See ACCOUNTING, 1; ASSETS, 3; COLLATERAL INHERITANCE TAX, 19; CONTEMPT, 2; DISPUTED CLAIM, 2; EXAMINATION BEFORE TRIAL; INFANT, 3; SALE OF REAL ESTATE, 2, 3.

KINSHIP.

Though evidence of reputation is competent to prove kinship, the testimony, in this regard, of witnesses not acquainted with the facts, and whose information is not derived from those connected or acquainted with the family, is hearsay and incompetent. *McCreedy v. Garbutt*, 252.

See DECLARATIONS; JURISDICTION, 1.

LEASEHOLD.

See DOWER.

LEGACY.

1. In order to render a bequeathed annuity a demonstrative legacy, and so

not liable to abatement in case of a deficiency of assets, the will must specify certain property owned by the testator in kind, the income arising wherefrom is to produce the amount of the annual provision. *Haviland v. Cocks*, 4.

2. Testator who left an estate of the value of about \$125,000, by his will directed the executors "to invest such sum of my (his) property as will net one thousand dollars . . . . per year . . . . and from such sum so invested to pay" to his widow, A., "the sum of one thousand dollars per year," from his decease, during widowhood, in lieu of dower; made provision for other beneficiaries; and disposed of the remainder. Upon a judicial settlement of their accounts, it appeared (1) that one of the executors had, in hand, all that remained of the estate, viz.: \$7,000, of which about \$4,000 represented principal rescued from the wreck of an authorized investment, and the balance accumulated interest; and (2) that A.'s claim for arrears of annuity was sufficient to exhaust the entire fund.—*Held*, that the annuity was a general legacy; and that, of the fund in question, A. was entitled only to the accumulated interest in the executor's hands, and such interest as might thereafter accrue upon the remaining corpus. *Id.*
3. Testator's will, after bequeathing legacies amounting to \$4,000, gave, devised and bequeathed "all the rest, residue and remainder of my (his) property and estate, both real and personal," unto certain persons named, their heirs and assigns forever. His personal property, at the time of the execution, was known to testator to be worth only about \$1,000. There was no specific devise of realty.—*Held*, that the legacies were charged on the realty. *Matter of Pettit*, 391.
4. A direction in a will that the amount of certain legacies, thereby bequeathed, be deposited in a savings bank, there to remain for five years, and that at the expiration of that period the same be paid to the legatees, they to receive the interest semi-annually in the interval, is not invalid, as unlawfully suspending the absolute ownership of personal property. *Matter of Farmer*, 433.

See COLLATERAL INHERITANCE TAX, 20; INTERPRETATION OF WILL, 2; SPECIFIC LEGACY; SUSPENSION OF OWNERSHIP; VESTING, 2, 4; WILL, 3.

#### LATENT AMBIGUITY.

See STOCK DIVIDENDS.

#### LETTERS TESTAMENTARY.

See REVOCATION OF LETTERS.

#### LOST WILL.

1. A lost will cannot be admitted to probate upon a stipulation of counsel agreeing as to its contents, though due execution be established. *Matter of Ruser*, 31.



2. Under Code Civ. Pro., §§ 1865, 2621,—requiring the provisions of a lost or destroyed will to be “clearly and distinctly proved by at least two credible witnesses,”—each of the witnesses must be able to testify to all of the disposing parts of the will; it does not suffice to prove some provisions by two or more witnesses and the remainder by others. The evidence of a witness who is shown not to have read the entire will, or otherwise to know all its contents, is valueless. *Id.*
8. The nature of the issues to be determined in a Surrogate’s court, upon an application for probate of a lost or destroyed will—declared. *Matter of Paine*, 361.

## MAINTENANCE.

See INFANT, 1, 2.

## MARRIAGE.

The existence of a trust provision, in a testator’s will, made to secure the dower right of one therein referred to as his wife, establishes the marital character, in the absence of opposing evidence, of one identified as the person intended, for the purpose of the protection of her rights in a Surrogate’s court. *Matter of Baker*, 271.

## MARSHALING OF ASSETS.

The judicial rule governing the order of application of a decedent’s assets, to the payment of debts—declared. *Smith v. Coup*, 45.

## MASSES FOR THE DEAD.

1. Testator’s will, after directing the payment of his debts and funeral expenses, gave \$500 to his executors, to be expended by them in having masses said for the repose of his soul. The executor having paid out one half of this amount for the purpose specified, and about \$300 as funeral expenses, it was, upon the judicial settlement of his account, on a creditor’s objection, that the amount paid for such expenses was “unauthorized in law, exorbitant and not justified,”—*Held*, that the trust for masses was void in its creation, the expenditure for that purpose unauthorized in law, and the sum paid therefor to be deemed assets in the executor’s hands, with which he was chargeable. *O’Connor v. Gifford*, 71.
2. The following provision in a will: “I hereby direct that my executor hereinafter named to have masses read for the repose of my soul for which I direct him to expend the sum of five hundred dollars,”—*Held*, void. *Schwartz v. Bruder*, 166.

## MASTER AND SERVANT.

The suspicion with which the law views a devise or bequest to a physician,

a counselor, or a guardian, from his patient, client or ward, is likewise indulged as between a master and a menial domestic servant. *Banta v. Willets*, 84.

See **UNDUE INFLUENCE**, 3.

#### NATURAL GUARDIAN.

See **INFANT**, 1, 2.

#### NEW TRIAL.

One applying for a new trial, on the ground of newly discovered evidence, must present the affidavits of the proposed witnesses, or explain his omission. *Matter of Collins*, 286.

#### NON-RESIDENT EXECUTOR.

Where a resident executor voluntarily removed from the State before completing his administration, and employed an agent to perform the unfinished business, the performance of which by himself was rendered impossible by his absence,—*Held*, that the executor must pay out of his own pocket for the services of the agent, and could not be remunerated, out of the estate, for traveling expenses incurred in returning to the State. *Matter of Ingersoll*, 184.

#### OBJECTIONS.

Where it appears that objections to the account of a decedent's personal representative, interposed by distributees of the estate, are not made in good faith,—as where the object sought is to delay the settlement and distribution, the court will, in the exercise of its statutory discretion, charge the costs and disbursements of the accounting, including the fees of the referee, to the objectors personally, and the same will be collected by deducting the amount from their respective shares of the estate in the accounting party's hands. *Matter of Selling*, 428.

#### OFFICIAL BOND.

1. Questions relating to the sufficiency and justification of sureties, in the bond of an administrator of the estate of an intestate, are to be determined in accordance with the provisions of Code Civ. Pro., § 813. *Matter of Thompson*, 56.
2. Where, of two persons, offered as sureties on such a bond in a penalty of \$15,000, one was able to justify only in the sum of \$10,000,—*Held*, that the other, justifying in an amount sufficient to cover the penalty for himself, might be allowed to "contribute to make up the sum" of \$5,000 for the former. *Id.*
3. In fixing the penalty of the bond of an administrator, c. t. a., about to

succeed an administrator appointed as in case of intestacy, regard must be had to the amount of an unpaid legacy, although the assets, wherewith to satisfy it may have been distributed among the next of kin. *Matter of Nesmith*, 333.

4. The husband of an administratrix of the estate of an intestate is a competent surety upon her official bond. *Matter of Grove*, 369.

See INTERPRETATION OF WILL, 2; TESTAMENTARY TRUSTEE.

#### PARENT AND CHILD.

See GUARDIAN AD LITEM; ILLEGITIMATE CHILD; INTEREST, 1, 2

#### PARTIES.

1. The general rule of courts of equity, as to who shall be parties to a controversy, does not prevail in a Surrogate's court. The purchaser, at a sale of decedent's real property under Code Civ. Pro., § 2794, not being made a party by the statute, cannot be deemed such, nor can he intervene and become a party, to the special proceeding. *Cromwell v. Phipps*, 60.
2. Decedent, during his lifetime, was a partner in business of one A., who died, leaving a will whereof decedent was appointed executor. Upon the death of the latter, B. was appointed administrator with the will of A. annexed, and C., decedent's widow, was appointed administrator of his estate, and instituted a special proceeding to procure a judicial settlement of her account, making B. a party. Thereafter B. commenced an action in the Supreme Court against C., in her representative capacity, for an accounting with respect to the partnership property, and the property of A., in her possession.—*Held*, 1. That B. was a proper and necessary party to the special proceeding in the Surrogate's court. 2. That the attitude of B., in that court, was that of a creditor, urging his claim along with the other creditors of decedent's estate; and that neither at the instance of B. or C., nor by consent of both, could the court adjust the differences between those parties; although, if B.'s claim were admitted, the court had power to direct its payment. *Wette v. Bosch*, 364.

See REVOCATION OF PROBATE, 2; SALE OF REAL ESTATE, 7.

#### PARTNERSHIP.

- A provision in a partnership agreement, that the death of a member shall not work a dissolution, but that the business shall continue and be conducted by the survivors until a day specified, is invalid and abortive,—it being beyond the competency of the parties thus to modify or abrogate the law of wills and intestate distribution. *Laney v. Laney*, 241.

See PARTIES, 2.

## PAYMENT OF DEBTS.

See EXECUTORS AND ADMINISTRATORS, 2; MARSHALING OF ASSETS.

## PENSION MONEY.

Testator, during his lifetime, being a pensioner of the United States government, received from a pension agent, in the usual manner a draft for \$1,200, deposited the same in bank, and obtained a certificate of deposit, which he held at the time of his death, and the amount whereof was collected by the executors of his will, upon surrender of the certificate.—*Held*, that this money was not protected from the claims of decedent's creditors, either by U. S. R. S., §§ 4718, 4747, or by Code Civ. Pro., § 1393; but was assets in the surviving executor's hands, properly applicable to the payment of debts. *Beecher v. Barber*, 129.

## PERSONAL DEMAND.

See CONTEMPT, 3.

## PERPETUITIES.

See SUSPENSION OF OWNERSHIP.

## PETITION.

A petition seeking to procure the revocation of probate of a will under Code Civ. Pro., § 2047, and, *part passu*, the vacating of the decree granting probate upon a ground specified in *id.*, § 2481, subd. 6, is objectionable on the ground of multifariousness. *Hopkins v. Lane*, 12.

See SALE OF REAL ESTATE, 5.

## PIOUS USES.

See MASSES FOR THE DEAD.

## POWER OF SALE.

See WILL, 2.

## PRACTICE.

See COLLATERAL INHERITANCE TAX, 18; PROBATE OF WILLS, 5, 6.

## PROBATE OF WILL.

1. *It seems* to be no ground for rejecting an alleged will, that its provisions are obscure and difficult of interpretation. The paper propounded as decedent's will was, substantially, as follows: "After my mother's

death, my cousin, S., is my heir. This writing is instead of a formal will which I intend to make. M. B. executrix."

"Witnesses:

[Signature]

M. B.

M. J. B.'

[Date.]

*Held*, that on due proof of the *factum*, including the declaration of the testamentary character of the document, the petition for probate must be granted. *Matter of Beebe*, 43.

2. After her will had been duly and completely executed and published, testatrix informed the draftsman that she wished to bequeath to one J. her household furniture, and other articles then and there specified, and a bureau to S. The draftsman wrote these directions on a slip of paper, stating that he would paste the latter in the will, on reaching home. When produced for probate, the will presented a cross-section into which the post-testamentary slip had been inserted by the draftsman,—there having been no re-execution or re-publication.—*Held*, that the instrument should be admitted, as executed, excluding the interpolated clause. *Stevens v. Stevens*, 202.
3. Upon an application for the probate of the alleged will of decedent, it appeared, from the depositions of B. and C., the subscribing witnesses, that they severally wrote their names as such, on the paper propounded, and that decedent, in their presence, declared the same to be her will. The deposition of one, S., further disclosed the facts that decedent had acquainted him with her purpose "to settle" some money she had in America, and, on being informed that two witnesses would be necessary, had asked deponent to find "two responsible working men," to act in that capacity; that deponent had waited upon B. and C., obtained their consent to witness the execution, and promised to notify them when to attend, afterward reporting the result to decedent, who said "all right." There was no attestation clause.—*Held*, in the absence of evidence that B. and C. had been actually summoned,—that their subscription was personally observed or requested by decedent,—or that the latter took charge of, or ever saw, the paper after execution,—probate must be refused for want of proof of the request required by 2 R. S., 63, § 40, subd. 4. *Matter of McMulkin*, 347.
4. The paper propounded as decedent's will purported to have been executed by cross-mark, was unaccompanied with an attestation clause, and presented, at its end, the names and residences of the subscribing witnesses and the name and mark of decedent, in a confused jumble, which afforded no clue as to the order of time in which the several signatures had been affixed. In the absence of explanatory evidence,—*Held*, that probate must be refused for want of proof that the subscription by decedent preceded, in time, the acts of the attesting witnesses. *Id.*
5. A Surrogate's court, being invested with general jurisdiction to take proof of wills, must exercise the same in the manner pointed out by statute, provided that the legislature has prescribed a certain mode of proce-

dures; but where the manner in which the court may proceed to obtain jurisdiction of a person necessary to the probate of a will is not designated by statute, an incidental power exists to adopt such practice as will best accomplish the required ends, including the protection of the legal rights of all persons interested. *Will of Crumb*, 478.

6. After decedent's will had been admitted to probate, and letters testamentary issued to the executrix therein nominated, the latter discovered the existence of an heir and next of kin of decedent, who had not been cited to attend the probate. Thereupon, the court, in the absence of specific statutory direction as to the mode of procedure, issued a citation to the heir, to attend the probate and show cause why the proceedings had should not stand and be confirmed. *Will of Crumb*, 478.
- See APPEAL, 2; BURDEN OF PROOF; COSTS, 3, 4; DECREE; EXAMINATION BEFORE TRIAL; EXECUTION OF WILL; INFANT, 3; INSANE DELUSION; INTEREST IN EVENT, 1, 2; JURISDICTION, 1, 2; LOST WILL; MASTER AND SERVANT; TESTAMENTARY CAPACITY; UNDUE INFLUENCE, 6.

#### PUBLIC ADMINISTRATOR.

Under L. 1871, ch. 335, creating the office of public administrator in Kings county (as amended by L. 1882, ch. 124), and giving to that officer prior right to administer an intestate's estate, "whenever such person shall die leaving any assets or effects" in the county, and there shall be no widow, husband or next of kin, etc., the requirement of the existence of property in the county applies only to decedents who, at the time of their death, *did not reside* within the State of New York;—all the "assets or effects" of the estate of a decedent, who, at the time of his death, *was a resident* of the State, being deemed to be located within the county of his latest residence. *Taylor v. Public Administrator*, 158.

#### PUBLICATION OF WILL.

See EXECUTION OF WILL; PROBATE OF WILL, 3.

#### PUNISHMENT FOR CONTEMPT.

See CONTEMPT.

#### PURCHASER.

See SALE OF REAL ESTATE, 3.

#### REAL PROPERTY.

See SALE OF REAL ESTATE.

#### REFERENCE.

The statute restricting the fees of a referee, on the trial of an issue, to six dollars per diem is mandatory upon the court. *Matter of Willett*, 435.

REMAINDER.

See COLLATERAL INHERITANCE TAX, 2, 4, 5; CONTINGENT REMAINDER.

REMOVAL OF CAUSE.

See EXAMINATION BEFORE TRIAL.

REPUTE.

See DEATH.

RES ADJUDICATA.

A decree, judicially settling an executor's or administrator's account which includes a bill for expenses of administration, shown to have been only partly paid, protects the accounting party as to that part, only, of the bill so paid, and leaves the question of the propriety of further payments on account thereof open for future settlement. *Matter of White*, 375.

REVISED STATUTES.

[Sections construed or cited.]

- 1 R. S., 337, §§ 1, 2.....*Will of Underhill*, 466.
- 1 R. S., 724, § 25.....*Barker v. Southerland*, 220.
- 1 R. S., 725, §§ 32, 33.....*Simpson v. French*, 108.
- 1 R. S., 773, § 1.....*Will of Underhill*, 466.
- 1 R. S., 773, § 2.....*Simpson v. French*, 108.
- 2 R. S., 63, § 40.....*Stevens v. Stevens*, 262.
- 2 R. S., 63, § 40, *subd.* 1, 4.....*Matter of McMulkin*, 347.
- 2 R. S., 63, § 40.....*Will of Crumb*, 478.
- 2 R. S., 64, § 43.....*Matter of Bunce*, 278.
- 2 R. S., 65, § 49.....*Matter of Bunce*, 278.
- 2 R. S., 65, § 49.....*Matter of Huiell*, 352.
- 2 R. S., 65, § 50.....*Hopkins v. Lane*, 12.
- 2 R. S., 75, § 33.....*Matter of Tyler*, 48.
- 2 R. S., 93, § 58.....*Matter of White*, 375.
- 2 R. S., 96, § 75.....*Matter of Southworth*, 216.

REVOCATION OF LETTERS.

A parent, as natural guardian of an infant beneficially interested under the will of a decedent, has no standing to apply for a revocation of the executor's letters,—it being requisite, under Code Civ. Pro., § 2685, that petitioner should be "a creditor or person interested in the estate." *Quin v. Hill*, 39.

## REVOCATION OF PROBATE.

1. In a special proceeding instituted under Code Civ. Pro., § 2647, to procure a decree revoking the probate of decedent's will, a sufficient petition having been duly filed, a citation was issued and served, regular in other respects, but directed to the executors in their individual names, without designation of their representative character. After the expiration of the sixty days specified in Code Civ. Pro., § 2517, the individuals holding letters appeared by counsel, for the sole purpose of moving to dismiss the petition, upon the ground of the failure, as against the executors, to commence the special proceeding within the time limited by statute (Code Civ. Pro., § 2648).—*Held*, that the court had power, under Code Civ. Pro., §§ 721—730, 2538, to amend the citation by the insertion of a description of the executors as such; and that, the exercise of this power being in furtherance of justice, the motion must be denied. *Matter of Soule*, 137.
2. A petitioner for the revocation of probate of decedent's will having omitted to include a legatee, named in the instrument, among those to whom the citation was directed (Code Civ. Pro., § 2649), the executor, after the expiration of one year from the recording of the probate decree (§ 2648), and after the expiration of sixty days from the presentation of the petition for revocation, moved to dismiss the proceeding, on the ground of such omission. This motion having been granted, petitioner subsequently moved for a rehearing, which was denied, but the court allowed the petition to be amended so as to bring in the omitted party. *Matter of Phalen*, 446.

See PETITION.

## REVOCATION OF WILL.

See AFTER-BORN CHILD, 1, 2; CODICIL; ILLEGITIMATE CHILD.

## SALE OF REAL ESTATE.

1. A Surrogate's court will deny a petition asking for a sale of all of a decedent's real property for the payment of debts, where any portion of that property is, by the will, expressly charged therewith. *Smith v. Coup*, 45.
2. The executrix of decedent's will having presented a petition, under Code Civ. Pro., § 2749, praying for a decree directing the disposition of the real property for the payment of debts, it appeared that the disposing portion of the will commenced as follows: "After all my just debts are paid;" and then devised all of decedent's real property in successive clauses, to designated persons.—*Held*, that the real property was "devised, expressly charged with the payment of debts" (Code, *ubi supra*), and that the court was, by the statute deprived of jurisdiction to entertain the application. *Id.*
3. A Surrogate's court has no jurisdiction, in a special proceeding instituted



under Code Civ. Pro., § 2749, for the disposition of a decedent's real property for the payment of his debts, to compel a purchaser at the instance of a freeholder appointed to sell the same, to accept the deed and pay the balance of the purchase money. *Cromwell v. Phipps*, 60.

4. A purchaser, upon a sale, under the statute, of a decedent's real property, having refused to complete the contract on the ground of a defect in the title, and the freeholder appointed to sell having moved to compel him to accept the deed and to pay the balance of the purchase money, it appeared that the premises in question had in November, 1851, been conveyed to Sarah B., and that, in 1861, "Sarah W., formerly B.," conveyed the same premises to the subsequent owner by a deed duly acknowledged,—the certificate of acknowledgment stating that S. W., the grantor, had been subjected to a private examination separate and apart from her husband. There was evidence of diligent and totally ineffectual efforts to ascertain facts concerning the existence of the grantor and her husband, and the fact of marriage.—*Held*, 1. That the consent of the husband, if any, was unnecessary, and the certificate of a separate examination, surplusage. 2. That, assuming the husband to have been, at the time of the conveyance by Sarah, a tenant by the curtesy initiate, he must be presumed to be dead, and his life estate extinguished. 3. That the purchaser should pay the balance of the purchase money, and accept the conveyance. *Id.*
5. The petition, in a special proceeding instituted to dispose of the real property of a decedent for the payment of debts, need not show the date of issuance of letters (Code Civ. Pro., § 2750); nor is it essential to allege that the property is not "subject to a valid power of sale for the payment" of debts or funeral expenses. *Matter of Haig*, 454.
6. The purchaser on a sale, in such a special proceeding, acquiring, under § 2773, the interest of the decedent existing at the time of his death, the proceedings are not affected by the happening, *pendente lite*, of an event whereby the interest of the decedent's estate becomes augmented. *Id.*
7. The holder of a mortgage upon the property, existing when decedent took title, who was not a creditor at the time of the death of the latter, is not a necessary party. *Id.*
8. The decedent, in 1862, entered into an oral agreement with his niece, H., and her husband, J., whereby all were to occupy and use, in common, the farm, and personal property thereon, of decedent, during his life,—he to be supported by them until his death, when the farm, and what remained of the personalty, were to be theirs. Upon an application for a decree disposing of decedent's real property, for payment of a debt alleged to be due to the petitioner, C., it appeared that, between 1878 and 1881, decedent had resided with and been maintained and cared for by petitioner, his sister, in consequence of the failure of H. and J. fully to carry out their agreement; and that he had died in 1882, leaving a will wherein he recited this agreement, and devised the farm to H., for life, remainder to her children, and nominated her

sole executrix. It was contended that decedent was not seized of the farm, at the time of his death.—*But*, on a jury trial, the verdict was in favor of petitioner, and a new trial was refused. *Matter of Bider*, 473.

See PARTIES, 1; WILL, 2.

#### SAVINGS BANK DEPOSIT.

See SUSPENSION OF OWNERSHIP, 1.

#### SPECIFIC LEGACY.

Where a testator, in indicating, in his will, the subject of a bequest, uses words which aptly describe property found by the executors among his assets, and are, also aptly, descriptive of property which the latter may purchase without recourse to his estate, the bequest may properly be treated as general. *Contra*, where such subject is a thing which the testator alone possesses. *Matter of Hastings*, 307.

See COMMISSIONS, 2; INTERPRETATION OF WILL, 1; STOCK DIVIDENDS.

#### STATUTE.

See CODE OF CIVIL PROCEDURE; COLLATERAL INHERITANCE TAX.  
INTERPRETATION OF STATUTE; REVISED STATUTES.

#### STATUTE OF DISTRIBUTIONS.

Decedent died intestate, leaving, him surviving, no descendants, parent, widow, brother or sister; but nieces and nephews, of the half blood and of the whole blood.—*Held*, that the former were next of kin "in equal degree to the deceased" with the latter; and that they all took equal shares of the personal estate, under 2 R. S., 96, § 75, subd. 9, 11, 12. *Matter of Southworth*, 216.

#### STATUTE OF LIMITATIONS.

In a special proceeding instituted by a legatee under Code Civ. Pro., § 2717, to procure payment of her legacy, the executors having filed an account wherein the widow of decedent, executrix, made a personal claim against the estate—it appeared that testator and his wife, the claimant, had for years resided together in the village of A., where the former had carried on the business of note brokerage and money lending, including the buying and selling of mortgages and other securities. The claim in question was for \$1,000 which the widow contended represented money belonging to her, which decedent had invested in a mortgage given to himself as mortgagee. It appeared that decedent had admitted the absorption of funds belonging to claimant in his own business, and had expressed a desire to protect the rights of his wife, in respect to moneys belonging to her and handled by him: that no demand had ever been made upon him for a settlement; and that

within six years he had assigned to the claimant a bond and mortgage to apply upon his obligations to her for moneys received by him as her agent. *Held*, 1. That, although the mere fact of payment to decedent of moneys of claimant was not conclusive in favor of her demand against the estate, the corroborative evidence was ample to support her claim, and that the same had not been satisfied. 2. That the defence of the statute of limitations was negatived by the circumstance that no demand had been made upon decedent, and that payment or delivery had been made upon account. *Hitchcock v. Willsie*, 250.

#### STOCK DIVIDENDS.

Testator's will contained a clause whereby he gave and bequeathed, to one nephew "twenty shares of the capital stock of the C. association;" to another nephew ten, and to each of three others five, shares of the same stock, *totidem verbis*. Forty-five shares of the stock described were found among his assets and duly transferred to the legatees. Previously to the transfers, dividends, earned in testator's lifetime, were declared upon the stock of the association, the share whereof, belonging to testator's estate, came to the hands of the executors; upon the settlement of whose account, the residuary legatee insisted that the bequests of stock were general, and had been fully satisfied by the transfers mentioned, it being contended, on the other hand, that the dispositions were specific, and carried the dividends.—*Held*, that, upon the face of the will, alone, the legacies appeared to be general in their character; but that extrinsic evidence was admissible to show the relation sustained by the testator and his estate towards the subject thereof. *Matter of Hastings*, 307.

See INTERPRETATION OF WILL, 1.

#### SUBSCRIBING WITNESS.

The provision of 2 R. S., 65, § 50, making a legacy, etc., to a subscribing witness to a will, void where the legatee's testimony is essential for procuring its admission to probate, cannot be waived by the petitioner for probate alone, where others are interested in the residuary estate. *Hopkins v. Lane*, 12.

See EXECUTION OF WILL, 1, 2; PROBATE OF WILL, 3, 4.

#### SURETIES.

See OFFICIAL BOND.

#### SURROGATES' COURTS.

See JURISDICTION.

#### SUSPENSION OF OWNERSHIP.

1. A direction in a will that the amount of certain legacies, thereby bequeathed, be deposited in a savings bank, there to remain for five

years, and that at the expiration of that period the same be paid to the legatees, they to receive the interest semi-annually in the interval, is not invalid, as unlawfully suspending the absolute ownership of personal property. *Matter of Farmer*, 433.

2. Testator's will, after devising a lot of ground to the town of Y., for the purpose of erecting a town hall thereon, bequeathed a sum of money toward such erection, "upon condition" that the town and people raise a sum specified, and apply it to the same purpose within three years from testator's death.—*Held*, 1. That the town had no power, under the R. S., to take the legacy. 2. That the disposition was void, as suspending the ownership of personal property for a period (of three years) which might exceed two lives in being. *Will of Underhill*, 466
3. Testator's will, after devising a lot of ground to the executors, in trust for the purpose of erecting a church edifice thereon for the use of any protestant Christian society which might first comply with certain conditions, bequeathed a sum of money to the executors, in trust, to apply the same toward such erection, "upon condition" that a specified sum applicable to the like purpose, be paid to the treasurer of the society, within three years from testator's death.—*Held*, that the bequest was void under the statute against perpetuities, and that the constitution of a trust did not prevent this result. *Id.*

See LEGACY, 4; WILL, 4.

#### TEMPORARY ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS, 1.

#### TENDER.

A tender, by an executor, to a legatee, of the amount of the legacy and interest lawfully due, if refused, bars a claim for interest from the time of the tender, as effectually in a Surrogate's court, as in a case of an attempted enforcement of the legatee's demand by a civil action against the executor. *Morgan v. Valentine*, 18.

#### TESTAMENTARY CAPACITY.

1. The doctrine of *Delafield v. Parish* (25 N. Y., 9) upon the subject of testamentary capacity—explained as deciding that every man is presumed to be *compos mentis*, and the burden of proof rests upon the party alleging an unnatural condition of mind to have existed in the testator. *Matter of Veeder*, 92.
2. Under Code Civ. Pro., § 2623, providing that a will must be admitted to probate, on application, "if it appears to the Surrogate" that the same was duly executed, and "that the testator, at the time of executing it, was in all respects competent to make a will," . . . . a proponent must show affirmatively, before resting his case, that the testator was of sound mind. *Ramsdell v. Viele*, 244.

See BURDEN OF PROOF, 1; INSANE DELUSION.

TESTAMENTARY TRUSTEE.

A Surrogate's court has no authority to make an order requiring a testamentary trustee to give a bond, although a breach of trust may have been committed, unless the complainant demonstrates the existence of circumstances which would justify a demand of security from an executor (Code Civ. Pro., § 2815). *Matter of Lawrence*, 342.

See COMMISSIONS, 3.

TOWNS.

See SUSPENSION OF OWNERSHIP, 2.

TRIAL.

See EXAMINATION BEFORE TRIAL; NEW TRIAL; REFERENCE.

UNDUE INFLUENCE.

1. The rule that undue influence, exerted to procure a testamentary disposition, must be sufficient to overcome free agency is limited to cases where the testator and his influential adviser stand upon a level, and does not apply where there is a confidential relation, and the latter occupies a dominating position. *Banta v. Willets*, 84.
2. While it is true, in every instance, that the influence alleged must be proved, the existence of such a relation, taken in connection with the fact of an unnatural disposition, shifts the *onus* to the shoulders of the one seeking to sustain the will. *Id.*
3. The will of decedent, who had been a servant in her employer's family almost twenty-nine years, and was unable to read or write, was made more than fourteen years before her demise, and disposed of her little all, consisting of her claim for unpaid wages for nearly the entire period, in somewhat elaborate provisions, in favor of her mistress, W., and descendants, to the exclusion of her own niece, her only next of kin, to whom she had ever been devotedly attached, and had stated that she intended to leave her property. There was evidence on the part of proponent, to show that decedent, at the time of execution, was confined to her bed by illness, and expressed a desire to make a will, stating her wish to leave her money where she had earned it; that proponent protested against such a disposition, but, at length yielding, procured the attendance of witnesses and a scrivener, and assisted decedent from her couch to the dining-room, where the document was drawn and subscribed. It was then taken by proponent and placed in her strong box, where it remained until she produced it for probate.—*Held*, that the efficiency of proponent's family, in respect of the genesis,

and solicitude for the preservation, of the will were too great to warrant the court in ignoring the presumption which the law raised against its validity; and that probate must be refused. *Id.*

4. The solitary circumstance of the existence of the relation of confidant and spiritual adviser, between a testator and the chief beneficiary under his will, is insufficient to create a presumption of fraud or undue influence. *Figuera v. Taafe*, 186.
5. Decedent, an unmarried woman, who died at St. Mary's Hospital, Brooklyn, five days before her death executed the will propounded, whereby she disinherited her sisters, and disposed of the bulk of her estate as follows: "All the rest, residue and remainder of my estate of every name and kind I hereby give, devise and bequeath unto my said executor, Rev. T——." It was not pretended that decedent was mentally incompetent, nor that there was direct evidence of undue influence on the part of T., who was her adviser in spiritual affairs. It appeared that decedent had expressed an intention to omit her sisters from the number of her beneficiaries, and had spoken of making dispositions in favor of certain charities by her mentioned, which however, she failed to do.—*Held*, that undue influence would not be presumed; that the provisions of the residuary clause were valid; and that T. took thereunder absolutely, for his own benefit. *Id.*
6. The paper purporting to be the will of decedent, an unmarried woman who left a number of blood-relatives, her surviving, was propounded by one who for many years had been her physician, was directly instrumental in procuring its execution, and was constituted sole beneficiary and executor. It appeared that decedent was, in the judgment of one of the subscribing witnesses, a physician, near the border line of insanity at the time of subscription; that she had repeatedly demurred to executing the instrument when requested to do so by proponent; and that the chirography resembled that of proponent, who, however did not admit that it was his own:—while, on the other hand, the evidence failed to show who originated the alleged will, in whose custody it had remained, how proponent obtained possession, or whether decedent had ever given any instructions as to its contents.—*Held*, that the paper was undeserving of probate. *Peck v. Belden*, 299.

See MASTER AND SERVANT.

#### VESTING.

1. The law favors the theory of the vesting of estates created by will, where a question arises as to whether a lapse has occurred. *Crossman v. Crossman*, 143.
2. Decedent's will directed that the executors set apart \$100,000 out of his estate, apply the income to the use of his wife for life, and, "from and after her death, pay over the said sum of \$100,000 to our adopted son, H., if he shall then have arrived at the age of 28 years"; with a provision for the contingencies of (1) the widow's death while H. was

under that age, and (2) the son's death under that age, leaving no lawful issue; but none for (3) the event,—which occurred,—of the son's death, at the age of more than 28 years, during the widow's lifetime. In the first event, the ultimate disposition was for the exclusive benefit of the son. Upon an accounting, after the death of H., and during the widow's lifetime,—*Held*, that the \$100,000 vested in H. on his arrival at the age of 28 years, and passed by his will, subject to the life right of decedent's widow. *Id.*

3. Testator, by his will, gave his entire estate, which consisted exclusively of personalty, to A., to hold the same in trust during the minority of testator's son, B.; adding: "and after he" (B.) "shall arrive at the age of 21 years, I give, devise and bequeath the same to" B., "his heirs and assigns forever." A subsequent clause provided: "*In case*" B. "shall die before arriving at the age of 21 years, then I give and bequeath to C. the sum of \$5,000, and all the rest . . . of my estate I give" . . . to A. and four others, to be equally divided among them. Of the beneficiaries, all of whom survived the testator, C., A. and another residuary legatee died before B., who died an infant.—*Held*, 1. That A., as trustee, took a vested estate, to continue until B.'s majority, or death in infancy, and unaffected by the provisions of the R. S., respecting the validity of trust estates. 2. That B.'s estate was contingent, depending upon the condition precedent of his attaining majority. 3. That the estates of all the subsequent beneficiaries vested, in right, at the death of testator, became absolute on B.'s death, and passed to their representatives, under 1 R. S., 724, § 25. *Barker v. Southerland*, 220.
4. The rule whereby a testamentary direction for the payment of interest or income of a fund, to one to whom the principal is directed to be paid or is given at a future time, is held indicative of an intent to vest the legacy, applies exclusively to cases in which the *entire* interest or income is so devoted. *Matter of Baker*, 271.

See ADOPTION.

#### VOUCHERS.

The provisions of Code Civ. Pro., § 2734, excluding the testimony of an executor in support of a claim for credit for disbursements, the vouchers in respect whereof have been lost, may be waived by those for whose protection the rule was established. Such a waiver is effected where the parties objecting to the account call the executor as a witness, and examine him as to the alleged payments. The same rule applies to a case of imperfect vouchers, explained by the testimony of the executor elicited by the objectors. *Rose v. Rose*, 26.

See EXPENSES OF ADMINISTRATION, 4.

#### WAIVER.

See COLLATERAL INHERITANCE TAX, 14; VOUCHERS.

## WARD.

See GUARDIAN AND LITEM.

## WILL.

1. Testator, by his will, directed the executors to invest the residue in a manner specified, and pay the net increase and income arising therefrom to his widow, for her support, during life; and further provided that, on the death of the widow, the residue be divided into five equal shares, one of which he gave to a grandson, H., and, in case he died before the widow, leaving issue, to the latter. H. was indebted to testator upon a promissory note, drawing interest, which the executors reduced to judgment; and died, after testator and before the widow, leaving issue, and the judgment unsatisfied. The judgment having been decreed to be a set-off to the claim of the issue, of their share of the residue after the death of the widow, it was further, — *Held*, that the interest accrued upon the judgment should be apportioned; so much thereof as had accrued at the date of the widow's death to go to her representatives, and the balance to the issue of the judgment-debtor. *Jennings v. Barry*, 22.
2. The will of testator directed the executor to sell his real property, at such times and in such lots as would be to the best advantage; invest the proceeds and apply the interest to the support of his widow and children during the minority of the latter; and ultimately to divide the principal. The executor erected, with funds of the estate, a dwelling-house, upon a parcel of the land, which was afterwards sold, with the improvements, at a loss of \$650. The evidence did not clearly disclose by whom the sale and conveyance were made. — *Held*, that, if the sale was made by the executor, he was liable for the deficit, having exceeded the authority conferred by the will; but that, if the beneficiaries sold the property, they conveyed a good title, and must be deemed to have taken the land and dwelling in lieu of the proceeds of sale, — thereby ratifying the executor's act in erecting the latter. *Rose v. Rose*, 26.
3. The will of testatrix provided: "I give, devise and bequeath all my household furniture, wearing apparel and jewelry to A. and B., to be distributed as I may designate and direct them while living." — *Held*, that this was an attempt to create a trust, void for uncertainty, in failing to give means of identifying the beneficiaries; and that the effects described fell into the residue. *Ludlam v. Holman*, 194.
4. The will of testator, which disposed of his real and personal property by the same clauses, (1) gave the use of all to his wife for life, with directions to the executors, if necessary, to expend the principal for her support, further providing that his daughter, E., should share in such use, if she stood in need thereof; (2) after the wife's death, gave "all the use of his remaining estate to E. and her husband, J., during their lifetime, respectively"; (3) after the death of E. and J., bequeathed all



the residue of his estate to an Orphan asylum, an institution incorporated in 1838. The instrument was executed within two months of the death of testator, who was survived by the beneficiaries. It was contended that the power of alienation and absolute ownership of property was suspended beyond the statutory limit.—*Held*, 1. That there was no trust, or contingent limitation, created, whereby the power of alienation of the real property was suspended for any period whatever. 2. That E. and J. took as tenants in common, with cross remainders; which, being invalid under the statute, might be dropped, and the gift to the asylum be held good to the extent of one half the testator's estate. 3. That, in order to determine the value of this half, the aggregate value of the several life interests, at the time of testator's death, should be deducted from the value, at that time, of the entire estate; and, it appearing that the whole remainder did not exceed one half of such estate, the asylum was entitled to receive the same,—one half payable upon E.'s death, and the other upon that of J. *Orphan Asylum v. White*, 201.

5. The second clause of testator's will gave to his wife the use, for life, of all the goods, furniture "and all other personal property (other than money, choses in action and securities)," which should be in or upon the homestead at his death. The third clause gave to his son, M., his property "in R., known as R. Arcade, . . . . with all the lands, buildings and appurtenances thereunto belonging, and all the furniture and *personal property* in and upon same or in any manner connected therewith." The residue of the estate, "both real and *personal*," was disposed of, mainly for the benefit of two granddaughters. There was no personal property, of any value, except what was in and upon "the Arcade"; where were found money, evidences of deposit, securities and choses in action.—*Held*, that M. took, under the third clause, with the Arcade, the furniture, and other *personal property* connected, and suitable for use, therewith; and that the money, securities, etc., formed a part of the residue. *Kenyon v. Reynolds*, 229.
6. Testator's will contained a bequest to his wife, M., of certain leasehold property, in lieu of dower, and after making other dispositions, gave the residue to his daughters. M. elected to take her dower instead of the leasehold, and claimed one third of the latter under the statute of distribution in case of intestacy.—*Held*, that the leasehold property fell into the residue. *Matter of Frost*, 431.
7. The will of testator, after a clause disposing of his residuary estate for the benefit of a society named, declared that, in case, for any cause, such clause should fail to take effect, so as to pass all or any part of such estate to or for the use of the society, he gave the same to A. and others named, and the survivors of them, "absolutely and in fee"; adding: "And this devise and bequest is in the confident belief that they will apply my estate and property so vesting in them in accordance with *my wishes*, but it is intended to be unconditional and free from any legal trust or obligation qualifying their absolute title."

The evidence in the probate proceedings failed to disclose any intent on testator's part to exact, or agreement by A., etc., to yield compliance with the wishes indicated.—*Held*, that the substituted disposition was valid, the legatees thereunder taking absolutely; and that a judicial construction of the prior clause was unnecessary. *Matter of Havens*, 456.

8. The will of testatrix directed the residue of her estate to be divided into seven equal shares, for the benefit of her three sons and four daughters. Each son's share was to be invested in the executors' names; the income of the share of the only adult son to be paid to him until he should arrive at the age of thirty years, and then the principal; the income of the infant sons' shares to be paid to their guardians until their majority, thereafter to the sons until arriving at the age of thirty years, when they should receive the principal. Similar provisions were made in favor of the daughters. In case of the death of a son, without issue, before receiving the whole of his principal, the unpaid portion thereof was to "revert to and form part of the residuary estate, to be divided into shares for the surviving children, as aforesaid." A son having died after reaching majority but under the age of thirty years, without issue,—*Held*, that the principal of his share must be held and invested, and the income applied, by the executors, to the benefit of the surviving children, as if the deceased son had never existed, except the proportion falling to a son who had passed the age of thirty years, which should be paid to him at once. *Matter of Leinkauf*, 470.

See ABATEMENT OF LEGACY; APPORTIONMENT OF LEGACY; CODICIL; CONTINGENT REMAINDER, 2; DOWER; EXECUTION OF WILL, 1; FOREIGN LEGATEE; INTERPRETATION OF WILL; LEGACY; LOST WILL; SALE OF REAL ESTATE, 8; STOCK DIVIDENDS; SUSPENSION OF OWNERSHIP, 2; UNDUE INFLUENCE, 3; VESTING, 2, 3.

#### WITNESS.

1. Upon an application for the probate of a will, it appeared that M., the decedent, and C. were two unmarried sisters who had lived for years together, owning and enjoying certain property in common. The alleged will dated August, 1878, gave the bulk of the estate to C., for life, with remainder to the family of T., who was nominated executor, and was one of the subscribing witnesses. Subsequently C., being the sole heir and next of kin of decedent, apparently ignorant of the existence of the will of M., obtained letters of administration upon her estate, sold certain of the real property affected, and died, leaving a will whereby she bequeathed \$1,000 to T., who was called as a witness by contestant, and asked to state conversations, had by him with M., bearing on the subject in controversy. Upon objection that T. was disqualified by *interest*, since the admission of M.'s will would, in effect, deprive him of the legacy bequeathed by C.,—*Held*, that he was competent to answer. *Todd v. Dibble*, 35.

2. The policy of the law embodied in Code Civ. Pro., § 829, whereby, in a probate proceeding, the husband of testatrix, being proponent of the will, was rendered incompetent to testify concerning communications with decedent, upon an issue as to testamentary capacity—declared a hoary superstition. *Matter of Vedder*, 92.

See CONTEMPT, 1; EXAMINATION BEFORE TRIAL; INTEREST IN EVENT, 1; LOST WILL, 2; SUBSCRIBING WITNESS.

*Ex. j. i.*

7-19-23



